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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 417

REFINERY EMPLOYEES' UNION OF THE LAKE CHARLES AREA,
Petitioner,

versus

CONTINENTAL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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CONTINENTAL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals, Fifth Circuit, entered in the above case on June 25, 1959.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Louisiana dated April 2, 1958, is reported in 160 Federal Supplement, 723. It is appended hereto as Appendix "A". The opinion of the United States

Court of Appeals for the Fifth Circuit dated June 25, 1959, is reported in 268 Federal (2d) Page , and is appended hereto as Appendix "B".

The judgment of the Court of Appeals was entered on June 25, 1959, and is appended hereto as Appendix "C".

JURISDICTION.

The judgment of the United States Court of Appeals was entered June 25, 1959. No petition for rehearing was filed.

The jurisdiction of this Honorable Court to review the judgment in question by writ of certiorari is conferred by Title 28 U.S.C. Section 1254 (1). Jurisdiction is invoked on the grounds that:

(1) There is sharp conflict and irreconcilable confusion in the decisions of the lower Federal Courts on the issues of law in question; and

(2) The specific issues here are important questions of federal law which have not been but should be decided by this Court; particularly since the inference, tenor and implication of this case is in conflict with the national policy delineated by this Court in the case of Textile Workers v. Lincoln Mills.[1]

[1] Textile Workers Union of America v. Lincoln Mills of Alabama (U. S. S. Ct.; 353 U. S. 448; 77 S. Ct. 912). See also: General Electric Co. v. Local 205, U. E. U. (U. S. S. Ct.; 353 U. S. 547, 77 S. Ct. 921); Goodall-Sanford, Inc., v. United Textile Workers (U. S. S. Ct.; 353 U. S. 550, 77 S. Ct. 920).

THE QUESTIONS PRESENTED.

The important federal questions which should be settled by this Court are:

(1) **Jurisdiction of the Courts:** What limitation of function should be exercised by Federal Courts in the determination of arbitrability of a dispute in a Section 301 action brought to compel arbitration pursuant to an arbitration provision in a collective bargaining contract referring to arbitration those "differences relating to the interpretation or performance of [the] agreement?"[2]

(2) **Authority of the Arbitrator:** Absent explicit contractual language so providing, does an arbitrator have authority to provide remedies or fix damages for violation of collective bargaining agreements to be consonant with the national policy affording broad liberalities to arbitration agreements[3] and placing sanctions behind such agreements as decided in Textile Workers v. Lincoln Mills?

The dispute has two major aspects. First, although the Courts have an avowed obligation to determine **arbitrability** as a preliminary matter, there are two divergent and conflicting views as to what such a determination entails. The question to be settled is whether a court has any right **in this type of proceeding** to inquire into the **merits** of the grievance under the guise of determining arbitrability.

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[2] Contract, Exhibit A, Section 22-1, p. 37.

[3] International Association of Machinists v. Cameron Iron Works (257 F. (2d) 467) certiorari denied (358 U. S. 880, 79 S. Ct. 120).

Second, what implied power does an arbitrator have to award a remedy (**any** remedy) for a violation of a bargaining agreement found by him to exist. (The Fifth Circuit has said—erroneously—**none,** unless expressly granted by the parties.) Mr. Justice Brown, dissenting below, has succinctly expressed the conflict between the national policy and the majority decision on the latter point as follows:

> "The idea of a person (an arbitrator) deciding a controversy so that his decision may then become the subject of a new and further one—controversy in bargaining—is repugnant to the scheme of an orderly disposition of disputes before they ripen into the seeds of industrial conflict."[1]

These questions must eventually be answered by this Honorable Court, for the answers will affect collective bargaining agreements and their administration throughout the nation. Moreover, the ever increasing conflict and confusion in the rapidly burgeoning body of jurisprudence being formulated by the Lower Courts is in need of direction and purpose which can be given only by this Court.

To effectuate the policies of the act and to prevent emasculation of the arbitration process in labor-management relations, the decision of the Court of Appeals should be reviewed **and reversed.**

This suit for specific performance of the arbitration provision in a collective bargaining agreement was

[1] Mr. Justice Brown's dissent in Ct. of App. opinion, p. 27, Tr. p. 104.

filed under Section 301 of the Labor Management Relations Act, which is appended to this petition as Appendix "D".[5]

STATEMENT OF THE CASE.

The basis for jurisdiction in the Court of the first instance is the mandate to all federal courts found in the *Lincoln Mills* decision to entertain suits to enforce arbitration provisions in collective bargaining agreements and to fashion suitable federal law therefor where necessary in the conformance with federal policy under Section 301 of the LMRA.

The facts pertinent to the questions presented are set forth in the opinion of the Court of Appeals and may be summarized as follows:[6]

During the night shift at the Continental Oil Company, Lake Charles Refinery, March 3, 1957, a dispute arose between the Company's shift foreman and the Union's representative over the foreman's assignment of an employee to work four hours overtime at a job that did not fit into his permanent classification, to the detriment of another employee who was entitled to that particular overtime assignment because of his job classification. On March 13, after discussions in which the Company agreed that the foreman had made a mistake, the Union representative filed a formal grievance requesting four hours' pay for the aggrieved employee "since his four hours were taken away from him and given to another classifi-

[5] 61 Stat. 156, 29 U. S. C. A. 185.

[6] Opinion of Ct. of App., p. 3, Tr. p. 80.

cation". The Union protest is predicated on the allegation of a violation of Section 8-1 of the contract.[7]

On March 18, the so-called "company policy" of "no work—no pay" for the first time in the dispute reared its head and was asserted by the Company to be the basis of its refusal to pay **any** sum to the aggrieved employee. A number of letters were then exchanged between the parties, the principal effect of which was that the Company gradually withdrew its admission of a mistake, presented various reasons for the commission of the act complained of and offered several substitute unilateral proposals for making the employee whole.[8] Above all, in each letter the Company leaned more and more heavily upon this newly discovered "no work—no pay" policy. (On which the decision of the Court of Appeals is largely and erroneously based.) No proposed solution was satisfactory to the Union, which next invoked arbitration. The Company agreed to arbitration "provided, however, that the arbitrator's decision shall be limited to a determination of whether such violation occurred and if the arbitrator shall

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[7] Exhibit A, Agreement between Continental Oil Company and Refinery Employees' Union of the Lake Charles Area, p. 12. Section 8-1:

> "Work peculiar to a classification shall be performed by employees assigned to that classification, except as otherwise provided for in this agreement, but the Company reserves the right to assign to such work available employees regularly assigned to other classifications when necessary for the efficient operation of the plant, provided that employees from the classification to which such work is regularly assigned are not available. Any employee so assigned shall receive the rate applicable to his permanent classification, or to the classification to which he is assigned, whichever is higher, except that for less than four (4) hours service, an employee's rate shall not be changed."

[8] Exhibits E, F, G, H, I, J and K, Tr. pp. 11-21.

determine that such violation occurred, the remedy shall be subject of negotiation between the Company and the Union."[9] This proposed limitation was rejected by the Union and this action for specific performance of the arbitration clause was made necessary.

ARGUMENT.

For clarity the petitioner's argument in favor of granting this writ may be divided into four parts as follows:

(1) The function of the Federal Courts in an action to compel arbitration under Section 301 is limited solely to the determination of

a) The type of dispute the parties agreed to submit to arbitration; and

b) Whether the dispute at issue is of that nature.

The Court has no right to inquire into the substantive aspects of the dispute or to determine the validity or merit of the claim under the guise of determining arbitrability, for this is a function of the arbitrator.

(2) **Implicit in the theory of arbitration is the fundamental authority of an arbitrator to award a remedy** unless explicitly denied such authority by the contract. The decision of the Fifth Circuit, adopting the opposite presumption in this unique and important facet of the Lincoln-Mills area, does violence to the na-

[9] Tr p. 19, Exhibit J

tional policy and destroy the efficacy of the decision of the Supreme Court.

(3) **This contract gives an arbitrator express authority to make a remedial award.** The clear and obvious interpretation of the contract almost deliberately overlooked by the Court below is the proper interpretation of the word "redress" set out in the grievance procedure clause.

(4) So-called company policy of "no work—no pay" cannot override federal policy or the terms of the agreement.[11] To give the **unexpressed** company policy supercedence over the so-called **unexpressed** authority of the arbitrator frustrates the purpose of Congress. Moreover, as a defense it is inapplicable because anticipatory and speculative.

(1) The function of the Federal Courts in an action to compel arbitration under Section 301 is limited solely to the determination of

a) The type of dispute the parties agreed to submit to arbitration; and

b) Whether the dispute at issue is of that nature.

The Court has no right to inquire into the substantive aspects of the dispute or to determine the validity or merit of the claim under the guise of determining arbitrability, for this is a function of the arbitrator.

[11] Exhibit B, p. 35, Section 19, paragraph 1; p. 37, Section 21-1

In *Lincoln Mills* this Court held:

> "Section 301 (a) is more than jurisdictional . . . it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[12]

The inarticulate major premise of the decision was that the arbitrability *vel non* of any dispute must be preliminarily determined before specific performance would be ordered.[13] This question in *Lincoln Mills* had been determined in the District Court.[14] Arbitrability had also been determined by the Lower Court in the companion *Goodall-Sanford* case.[15]

The tenor of the *Lincoln Mills* decision is positive in character. The decision denotes approval and encouragement of the arbitration process as a means of settlement of disputes between parties to collective bargaining agreements. Is this policy to be made stale, flat and unprofit-

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[12] Textile Workers v. Lincoln Mills (supra, note 1).

[13] "When one of the parties needs the aid of a court and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken its promise" (Local 149; Engineers v. General Electric Co.; 1st Cir. Ct. of App., 250 F. (2d) 922).

[14] Textile Workers Union of America v. Lincoln Mills of Alabama (U. S. Dist Ct.; unreported; 36 L. R. R. M. 2361).

[15] Goodall-Sanford, Inc., v. United Textile Workers (U. S. Dist. Ct. 131 F. Supp. 767).

able by a negative approach to the preliminary question of arbitrability?

This negative approach gives rise to the great semantic difficulty which should now be resolved by this Court. The lower Federal Courts are divided into two contending and conflicting camps. One of these says that in order to determine arbitrability it is only necessary and proper to determine (a) what type of dispute the parties have agreed to refer to arbitration, and (b) whether the dispute for which arbitration is sought is of that type.[15]

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[15] Boston Mutual Life Insurance Co. v. Insurance Agents (161 F. Supp. 222, U. S. Dist. Ct.):

"In time to come that case (Local 149 v. G. E.) may be narrowly limited to situations where a party to a collective bargaining agreement seeks to invoke arbitration of an issue clearly outside the specific provisions of the agreement. Except where the parties have agreed with explicitness beyond plausible controversy that a subject shall not be arbitrated, **a court will incline to require the parties to a collective bargaining agreement with arbitration provisions to take a dispute to the arbitrator for his exercise of primary jurisdiction.** That is the teaching of White House v. Illinois Central Railroad Co., 399 U. S. 366."

Boston Mutual Life Insurance Co. v. Insurance Agents (258 F. (2d) 516); Boston Mutual Life Insurance Co. v. Insurance Agents (171 F. Supp. 125); New Bedford Division v. Local 1113 (160 F. Supp. I. D. 3). In the last case, Judge Wyzanski held that "issues do not lose their quality of arbitrability because they can be correctly decided only one way." (Affirmed, New Bedford Division v. Local 1113 (258 F. (2d) 522).

Butte Miners Union v. Anaconda Copper Co. (159 F. Supp. 431). Unequivocally affirmed: unreported, 9th Cir. 44 L. R. R. M. 2475.

Machinist Association v. Cameron Iron Works, (5th Cir., 287 F. (2d) 467). Note here the presumption indulged in by the court that, unless **excluded**, disputes are arbitrable. This is in direct conflict with the holding of the same circuit in the present case. The 5th Circuit has thus contradicted **itself.**

Item Co. v. Newspaper Guild (5th Cir., 256 F. (2d) 855)

These cases explicitly or implicitly eschew inquiry into the merits of the claim and refer the issue to be settled to an arbitrator simply because the issue involves a disputed interpretation of the contract. What these cases have decided is that the parties have agreed to refer a particular type of dispute under their contract to arbitration—*i. e.*, one involving interpretation or performance of a provision of the document—and that the dispute is of that nature and type.

Such a determination may involve inquiry into whether the preliminary procedures have been complied with. But this is a fair subject for the Court since one of the requirements of such a dispute to make it **a type** referrable to arbitration is that it be properly processed. And the Court may determine whether the claim is in good faith, for a frivolous claim is not the type referrable to arbitration. But that ends it.

The important point is that these cases have not been decided on the basis of whether the claim is **meritorious.**[16] This is superfluous and unnecessary to a decision.

Operating Engineers v. Monsanto (Dist. Ct. 164, F. Supp. 406); Food Handlers v. Pluss Poultry (8th Cir., 260 F. (2d) 835). Note in this case the different **grounds** on which the District Court and Court of Appeals based the decision.

Tenney Engineering, Inc., v. U. E. (Dist. Ct., unreported, 44 L. R. R. M. 2422). This case decides that the grievance was of a **type** contemplated by the arbitration clause but does not decide the merits. (sic.)

[16] P. ex., New Bedford Division v. Local 1113 (supra):

"In this respect we think that the jurisdiction of the arbitrator, whose judgment is invoked in the collective bargaining agreement instead of that of the court, is similar to a court's jurisdiction. If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the

The function of the Court is **not** to determine the merits; this is the very question which is to be and must be determined by the arbitrator, and the very reason for the parties to refer to arbitration. This is the intent of the law.

Another line of decision (of which this case forms a part) holds that in order to determine arbitrability it is proper (or necessary say these courts) to review the facts on which the grievance is based in the light of the applicable contractual provisions.[17]

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claim may be crystal clear under the law. Indeed, if in the present case the grievance in question is confided to an arbitrator by the collective bargaining agreement, **the court** in a Section 301 proceeding **has no business to concern itself with a preliminary question whether the answer to the grievance on its merits may or may not be entirely clear under the language of the agreement."**

"While a frivolous or patently baseless claim should not be ordered to arbitration (Local 205, etc., v. Gen. Elec., 233 F. (2d) 85), **the controversy here is not of that type.** Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. **The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes**—in this case the arbitrators—**and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue."** (Butte Miners Union v. Anaconda Co., supra).

[17] The courts have misunderstood and exceeded their function in these cases:

Local 149 Engineers v. General Electric Co. (1st Cir., 250 F. (2d) 922). This is the case which appears to have instituted the tangent on which this group of cases has gone astray. The Court held arbitrability to be a preliminary question for the court, but did not define how far the court should go in making such a determination.

Kroger Co. v. Local 347, Meatcutters (Dist. Ct. Unreported, 41 L. R. R. M. 2545); Food Handlers v. Pluss (158 F. Supp. 650);

The Courts have done in these cases what an arbitrator would and should do—interpret the contract. By virtue of the very act of interpreting the contract to determine arbitrability these Courts are demonstrating that the issues are arbitrable. Yet some have dismissed the actions on the ground that there was nothing in the contract to support the grievance, a conclusion reached only by **interpreting** the contract. What has really happened is that the court has decided the merits of the grievance, thus clearly usurping the function of the arbitrator.

Engineers Association v. Sperry Gyroscope Co. (2nd Circuit, 251 F. (2d) 133).

Steelworkers v. American Manufacturing Co. (6th Circuit, 264 F. (2d) 614). In this case the court decided the **grievance itself.**

By the same method was decision reached in American Stores Co. v. Johnston (Dist. Co., 171 F. Supp. 275).

U. E. v. General Electric Co. (172 F. Supp. 53) when the court completely decided the grievance on its merits and denied arbitration. This is the very kind of decision the agreement to arbitrate seeks to avoid.

Local 201, I. U. E., v. General Electric Co. (1st Cir., 262 F. (2d) 265). The court again decides the grievance under the guise of determining arbitrability.

Grain Millers v. Ralston (Dist. Ct. Unreported, 44 L. R. R. M. 2419); the court here has predecided the grievance and about all the arbitrator can do is rubber stamp it.

Steelworkers v. Warrior and Gulf Nav. Co. (5th Cir. Unreported, 44 L. R. R. M. 2567). The dissent describes the error of the court beautifully: "They (the findings of fact) involve a determination of the merits of the union's grievance, and, consequently, **constitute an invasion of the province** of the arbitrator." (Emphasis supplied.)

Sunnyvale Assn. v. Westinghouse (Dist. Ct. Unreported, 44 L. R. R. M. 2735). This reaches the ultimate in excessive inquiry. See note 21, infra.

N. B. This large body of jurisprudence is in sharp conflict with the cases cited in note 15, supra. This is the conflict to be resolved by this Court.

Consequently, under these cases, if arbitration is ordered the arbitrator can only follow the interpretation placed on the contractual provision by the court or find himself in the ridiculous position of **reversing** the federal court. Such is the situation in this case—the parties have been ordered to arbitrate the grievance, but for the arbitrator to find a **remedy** implied in the language of the contract is for him to reverse the Fifth Circuit.

If a court, under this line of decisions determines that the dispute has no merit (and concludes then that it is therefore **not** arbitrable) the result is that the arbitration has been held in the court, **not** before the arbitrator which is the very thing the arbitration clause was designed to avoid.

If this line of decisions were to stand, the arbitration process would atrophy and wither away, and the federal courts would be overwhelmed with mountains of arbitrations, in essence, by the simple refusal of one party to a collective bargaining agreement to submit to arbitration on the ground of non-arbitrability of the issue.

This line of decision is patently wrong, and in complete conflict with the national policy. In another context this court has had occasion to consider a parallel problem.[18] To compare, if a *bona fide* dispute arises between

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[18] Bell v. Hood (327 U. S. 678; 66 S. Ct. 773).

> "Jurisdiction, therefore, is not defeated (as respondents seem to contend) by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues

parties to a collective bargaining agreement based on the interpretation of the agreement, the arbitrator does not lose jurisdiction because the claim may not be supported by the contract.

It is to be noted that the Circuit Courts have even contradicted themselves.[19] This is because there has not yet been a clear definition drawn by this Court of the limit of inquiry of federal courts into the merits of grievances for the purpose of determining arbitrability. Because this case squarely presents this issue as well as the important issue of the arbitrators implied authority the writ should be granted.

(b) Another aspect of the role of the federal courts in 301 actions to compel arbitration should be considered. Cases under 301 concerning enforcement of agreements to arbitrate fall into two general categories.

The first category, of which this case is an example, is an action to compel the adverse party to submit to arbi-

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of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

"But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction."

[19] New Bedford Division v. Local 113 is in conflict with Local 149 v. Engineers. The decision in this case conflicts with the Fifth Circuit's holding in both the Item Company case and the Cameron Iron Works case.

tration. The second category is an action to enforce or stay an award **after** arbitration.[20]

If it is proper at any time for the court to inquire into the merits of a dispute it is in the latter kind of action in the nature of a **review of** or **appeal from** a decision of an arbitrator. Before an arbitrator has made a decision, neither party has suffered any loss, and an action to prevent such a loss is premature.[21] Until the arbitrator has exercised his primary jurisdiction and exceeded it, there is nothing for the court to determine with reference to the merits. The only action which could place the **substance** of the grievance at issue before the Court is a **misinterpretation** or **misapplication** of the contract to the facts of the grievance **in arbitration.**

Which only serves to point up the fact that in an action to **compel** arbitration the courts have no right to inquire into the substantive interpretation of the applicable contract clause on which the grievance is based.

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[20] For example, see Kornman v. Amalgamated Clothing Workers (6th Circuit; 264 F. (2d) 733); Textile Workers v. Cone Mills (4th Circuit; unreported; 44 L. R. R. M. 2345).

[21] Sunnyvale Assn. v. Westinghouse Corp. (supra, note 17).
This is the ultimate in anticipation and speculation. The grievance was held inarbitrable because the arbitrator might find for the grievant, which would be (according to the Court) a violation of the terms of the contract. The Court then decided the grievance on the merits for the company.

(2) ***Implicit in the theory of arbitration is the fundamental authority of an arbitrator to award a remedy*** **unless explicitly denied such authority by the contract. The decision of the Fifth Circuit, adopting the opposite presumption in this unique and important facet of the Lincoln-Mills area, does violence to the national policy and destroys the efficacy of the decision of the Supreme Court.**

The question of arbitrability is for the Court to determine on the basis **only** of whether there is a *bona fide* dispute as to the meaning of terms in the contract. The Fifth Circuit has gone far beyond this limited inquiry, into the substance and interpretation of the very clauses which the arbitrator alone should interpret. The Court has thus given lip service to the mandate of the *Lincoln Mills* decision and then proceeded to reverse the Supreme Court in effect by a narrow negative construction of the arbitration provisions of the contract.

The presumption indulged in by the Court is that unless a provision for damages is expressly included, it will not be considered.[22] This conflicts directly with the intent and policy of the law, which considers that, unless expressly excluded, there is a presumption that the arbitration process provides complete relief.[23]

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[22] Opinion of Ct. of App., Sec. 3, Tr. p. 90.

[23] For comparison, there is no express statement in Section 301 of the Labor Management Relations Act that specific performance of suits to compel arbitration are to be entertained by the federal courts. Yet in Lincoln Mills this Court found such authority by implication.

Arbitrators generally have adopted this presumption:

"Mississippi Aluminum Corporation, November 14, 1956, 27 L.A. 625 (Bureau of National Affairs publication): 'Arbitra-

Thus the Fifth Circuit makes cowards of us all, and thus the native hue of a grievance is sicklied o'er with the pale cast of negative presumption; and arbitrations of great pith and moment with this regard their currents turn awry, and lose the name of action.

By this decision the Fifth Circuit has erected an enormous roadblock to the smooth functioning of the arbitration process, not only to the parties in this case, but to parties to collective bargaining agreements throughout the country. An issue has been created which did not previously exist. Express grants of authority to arbitrators to make awards which has previously been considered to

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tors have uniformly declared that the absence of contractual language imposing sanctions in such cases is no bar to the awarding of compensation.' See also Phillips Chemical Company, 17 L.A. 721: 'The sole question is, what is complainant's remedy? . . . The purpose of arbitration is to settle disputes justly and fully, as substitutes for strikes and lock-outs. If a grievance has no merit, relief is denied; but if it has merit adequate relief should be granted. That is what the parties contemplate. Anything less than that would not effect justice and would not satisfy the complaining party. Therefore, it is implied in the arbitration section that the arbitration board has power to grant adequate relief. The power merely to decide that the agreement has been violated, without power to redress the injury, would be futility in the extreme. . . . Making such an award is not adding a term to the agreement; it is merely carrying out the clearly implied purpose of arbitration, viz., to grant proper relief for meritorious grievances.'"

See also: International Harvester Company, 1947, 9 L.A. 894; Standard Lime & Cement Co., 1956, 26 L.A. 468; Bridgeport Glass Co., 1952, 19 L.A. 690; International Harvester Co., 1950, 14 L.A. 430; Ingersoll-Rand Co., 1947, 7 L.A. 564; Bethlehem Steel Co., 1947, 7 L.A. 493; United States Rubber Co., 1949, 13 L.A. 840; 27 L.A. 625; Vanette Hosiery Mills, 1951, 17 L.A. 349; American Machine & Foundry Co., 1950, 15 L.A. 822; Celanese Corporation of America, 1954, 24 L.A. 168; Goodyear Atomic Corporation, 1956, 27 L.A. 634.

be one of their principal purposes) or to adjust wrongs have been made necessary by this decision. Yet such specific authority has not previously been required in collective bargaining agreements."[1]

The point to be emphasized is that the specific remedy, no matter what is awarded, should be determined, not by the Company unilaterally, and not at the bargaining table, but by the arbitrator as the **natural consequence** of a finding of a violation made by that same arbitrator.

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[1] See Mr. Justice Wyzanski, Boston Mutual Life Insurance Company v. Insurance Agents International Union. (Supra note 15.)

This case was remanded (not reversed as the Fifth Circuit indicated) for determination of whether all steps preliminary to arbitration were complied with. Boston Mutual Life Insurance Company v. Insurance Agents International Union (258 F. (2d) 516). The steps were held to have been complied with. Boston Mutual Life Insurance Company v. Insurance Agents International Union (171 F. Supp 125). Mr. Wyzanski is cited particularly because he appears to have most accurately and articulately predicted in this and other cases the ultimate course of the jurisprudence in this important field.

See also Fruit Packers Union v. Torvig Fruit Company (160 F. Supp. 623) and Textile Workers v. American Thread Company (113 F. Supp. 137). New Bedford Division v. Local 1113 (160 F. Supp. 103); New Bedford v. Local 1113 (258 F. (2d) 522).

The Court's remarks in the last cited case (New Bedford v. Local 1113) are analogous to the situation here.

"In this respect we think that the jurisdiction of the arbitrator, whose judgment is invoked in the collective bargaining agreement instead of that of the court, is similar to a court's jurisdiction. If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal clear under the law . . ."

By the same token, an arbitrator who has jurisdiction of the basic claim does not lose jurisdiction to determine and award a remedy simply because the power is not expressly set forth. Otherwise, the decisions of arbitrators would truly become tales told by idiots full of sound and fury, signifying nothing.

The crux of the case is whether the fundamental authority of an arbitrator, inseparable from his responsibility to decide the merits of an arbitration case, includes the power to determine if a remedy is called for, and if so, what specific remedy. The Fifth Circuit has said that this power is not inherent in the arbitration function, but must be expressly granted in the bargaining agreement. This is like saying that the power of a Court to award damages is not inherent unless expressly included by the parties in litigation.

Petitioner believes that the policy of the federal law must dictate that such authority inheres in the forum of arbitration unless **expressly excluded** by the agreement.

The question of which presumption is to prevail should, **indeed must**, be decided by this Court to set the question at rest and to effectuate the congressional policy of the L. M. R. A.

The basic issue, *i.e.*, misassignment of overtime work, was held to be arbitrable. In fact the Company has virtually admitted an error in the interpretation of the contractual provision at issue.[25]

The Fifth Circuit has indicated that the Union and or the employee might have some remedy for such a misassignment.[26] The question is: if the Union has a

[25] Tr. p. 8, Exhibit C.

[26] The Court of Appeals thus contradicts itself in two consecutive paragraphs:

> "The settlement of a job classification is sufficient justification in itself for resort to arbitration. There is no reason to assume that the parties must have intended a penalty to be implied in order to make the contract operative" (Opinion of Ct. of App., p. 20, Tr. p. 97).

remedy where does the Union get it? Certainly not at the bargaining table because this is no remedy, this is a fight (as Mr. Justice Brown has phrased it) which begins after leaving the hall (of arbitration, *sic.*).

If not at the bargaining table is it in Court? If this is the intent of the Fifth Circuit, then the principle of the *Lincoln Mills* decision is violated, for the whole tenor of that decision was to avoid costly judicial proceedings and to provide for an orderly disposition of conflicts by resolution through arbitration.

This result is reached by the Fifth Circuit by a completely artificial division of the grievance into the two parts: one as to the merits of the case and the other as to the consequences which would flow naturally from it. The Fifth Circuit has said that although the merits of the grievance are arbitrable, since there is nothing in the contract which specifically grants authority to the arbitrator to consider the consequences, he therefore cannot make an award or grant a remedy to the aggrieved parties. (As will be seen, this is not a correct interpretation of the provisions of the contract.)

Then the Court goes on to imply clearly that a remedy other and more than the mere settlement of the classification is indicated:

". . . **this Court is not passing on any remedy the aggrieved employee or the Union may have for misassigned overtime work. That issue is not before us. We are simply pointing out that the contract contains no express or implied provision covering a money award for misassignment of overtime, from which might be drawn the inference that the remedy was a matter of 'interpretation' or 'performance' of the contract and therefore an arbitrable issue.**" (Emphasis supplied.) (Opinion, Ct. of App., p. 21, Tr. p. 98).

Labor management contracts are not conceived to be narrow, tightly worded documents providing for every possible contingency as would a contract for the construction of a large building, complete with details, specifications, etc. These agreements are an industrial complex, a way of life for partners in an organic relationship, and could not be drafted as the Court below would require, so as to provide rules and penalties for every conceivable violation, and state each instance where the arbitrator is authorized to act.

Thus the Fifth Circuit has gone awry in the most important aspect of the *Lincoln Mills* territory and the decision should be reviewed and reversed by this Court.

(3) *This contract gives an arbitrator express authority to make a remedial award.* The clear and obvious interpretation of the contract almost deliberately overlooked by the Court below is the proper interpretation of the word "redress" set out in the grievance procedure clause.

Under the contract, all arbitrations are grievances for they must be processed through the grievance procedure before going to arbitration.[28] The grievance section of the contract begins as follows:

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[27] Boston Mutual Life Insurance Company v. Insurance Agents Union (U. S. Dist Ct., 161 F. Supp. 222).

[28] Not all grievances will turn out to be arbitrable, however. The significance of the word "only" used in the beginning of Section 21-1 is that it makes the distinction between arbitrable and non-arbitrable grievances. Arbitrable grievances are those which involve the interpretation or performance of the agreement. All others are non-arbitrable.

"It is agreed that any employee or group of employees may individually or through their representative present grievances to their immediate supervisors. If any employee or group of employees believe themselves to be injured or treated unfairly by the Company, he or they may seek **redress** as follows:" [29] (Emphasis supplied.)

Thereafter follows the series of steps to be taken in processing agreements culminating in an appeal to the regional manager of manufacturing. Section 21 of the agreement (arbitration) begins as follows:

"Only differences relating to the interpretation or performance of this agreement which cannot be adjusted by mutual agreement **after processing through the grievance procedure** may upon written notice by one party to the other not later than 60 days after the date of the decision of the regional manager of manufacturing be submitted to arbitration." [30] (Emphasis supplied.)

In order to determine what the purpose of the **whole** grievance arbitration process is, one must refer back to its genesis, the grievance procedure section.

The grievance procedure clearly states that the purpose of the grievance-arbitration process is to provide **redress** for the injured party. To redress an injury is (1) to set right, (2) to repair, (3) to make amends for, (4) to **remedy**, (5) to relieve, or (6) to make amends to.[31]

[29] Exhibit A, p. 35, Sec. 19; p. 37, Sec. 21-1.
[30] Note 29, supra.
[31] Webster's Collegiate Dictionary, (1951 Edition) p. 709

To remedy a wrong does not mean simply to declare it to exist but to relieve it and to set it aright.

If an employee seeks redress through the grievance-arbitration procedure, and if the particular grievance is arbitrable, (as is admittedly the case here) then the forum where wrong is to be righted is arbitration. It must then follow that the authority of the arbitrator includes the power to make an award or to provide a remedy which will make amends for the wrong. The settlement of a classification or the determination of what the proper assignment should have been will not make amends for the wrong which has been done.[32]

The question which the opinion of the Circuit Court fails to answer is: What is the remedy for subsequent violations of the same provisions of the contract? There is no deterrent, there is no corrective measure, and merely settlement of the classification does not provide means of redress in the future, for the employee or employees whose rights might **thereafter** be violated, time after time after time with complete impunity. An arbitration decision which only settled a question of classification would be empty and meaningless. Unless there is a remedy (determined by the arbitrator), the employee is still in the same position he was before; and there is no sanction against future violations by the Company.

The Court of Appeals might answer that the proper forum for such a future violation is the Court. This is exactly what is wrong with the decision; instead of sim-

[32] The Fifth Circuit indicated that settlement of the classification is the only purpose of arbitration. (Opinion of Ct. of App. Tr. p. 97). (See also, footnote 26, supra).

plifying, it complicates the process; instead of promoting industrial peace, it adds an additional element for contention; and instead of encouraging, it stifles the arbitration process.

The intent of arbitration is to place in the care of an expert selected by both parties the determination of which remedy, if any, is proper in arbitrable grievances. The Court of Appeals, by ignoring the term "redress," has catapulted the parties into a situation far worse than the one they were in before. And it has done so only by meticulously avoiding the plain terms of the contract. Here again is reversible error.

(4) So-called company policy of "no work - - no pay" cannot override federal policy or the terms of the agreement. To give the *unexpressed* company policy supercedence over the so-called *unexpressed* authority of the arbitrator frustrates the purpose of Congress. Moreover, as a defense it is inapplicable because anticipatory and speculative.

The so-called company policy of "no work—no pay" appears nowhere in the collective bargaining agreement. This policy only makes an appearance **after** the grievance was filed requesting four hours' pay as the damages suffered by the aggrieved employee.[33] Petitioner does not necessarily adopt General Forrest's axiom for

[33] This policy makes its first appearance in the letter from the company dated March 18, 1957, over ten months later than the date of the contract and a week after the grievance was filed. There is no evidence that it was ever otherwise widely published, well understood, or consistently enforced, the universally accepted criteria for reliance on such a policy. (Exhibit A, title page; and Tr. p. 8, Exhibit C, last sentence.)

winning battles, but the demand to submit the question of remedy to the arbitrator came long before the company policy was asserted as a defense. Yet the Fifth Circuit saw fit to give weight to the company policy but denied the Union's assertion of arbitrator's authority although **neither one** was explicitly set out in the contract. Thus the negative principle espoused by the Company has been found superior and the positive principle supported by congressional and judicial intent has been found wanting.

The real point, which the Fifth Circuit missed, is: The Company's "policy" defense is completely premature. The Union is only asking that the general question of remedy—any remedy—be submitted to the arbitrator. Until an arbitrator has made an award affording relief contrary to the "policy," the Company has not been hurt and has nothing to complain of. The defense is not available now based on what **might** happen in the future.

To deny the Union its day in arbitration on the ground that the arbitrator **might** make an award in excess of his authority is anticipatory and speculative in the extreme, and bespeaks an unjustified clairvoyance in the Fifth Circuit Court. How could the Fifth Circuit, or anyone else, predict that an arbitrator will make a ruling which would violate the Company's defense?[34]

[34] Cf. Whitehouse v. Illinois Central Railway Co. (U. S. S. Ct. 349, U. S. 366, 75 S. Ct. 845), the court, in inquiring into the merits of a dispute, stated: "These are perplexing questions. Their difficulty admonishes us to observe the wise limitations on our function and **to confine ourselves to deciding only what is necessary to the disposition of the immediate case.**" (Emphasis supplied.)

If the company policy defense is available it should be raised before the arbitrator, not here. The Company still would have its day in Court if a contrary award was made by an arbitrator despite this defense. The Company could then bring an action to set aside the award, or defend an action to enforce it.[35] But these devices are available later, not now. At this step in the proceedings, the defense is only speculative, anticipatory and premature.

Should the Company urge in answer that all issues could be settled here in one action, the obvious answer is that **there can be no issue based on violation of company policy until it has been violated.** Yet the Fifth Circuit, in an excess of conservatism, seized upon this "policy" defense as its principal ground for denying petitioner its full rights to arbitration under the clear terms of the agreement.

It is not necessary to the disposition of **this** case for the Court of Appeals to predict what an arbitrator **might** decide contrary to the company's "policy." It is only speculative and argumentative. See also Sunnyvale Assn. v. Westinghouse Corp., notes 17 and 21 supra.

Cf. Textile Workers v. Cone Mills Corp. (U. S. Ct. of App., 4th; unreported, June 16, 1959; B. N. A. publication, 44 L. R. R. M. 2345) "The purpose of Congress to give effect to employer-union contracts and **to afford full relief** for breaches of those contracts would be frustrated if the courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept."

How much more frustrating to the national policy is this decision, which in advance of any hearing denies the arbitrator's right to make awards even though the parties have here given advance acceptance. See Exhibit A, p. 38, Sec. 21-2.

See also Kornman Co. v. Clothing Workers (U. S. Ct. of App., 6th; 264 F. (2d) 733).

This company policy issue comes well after the demand for reimbursement for time lost and yet it was seized upon by the Court as an excuse for limiting the arbitrator's authority. Certainly a johnny-come-lately invention of company policy must yield to the broad affirmative policy of the federal government and of this Court, promoting and encouraging peaceful settlement of labor disputes through the processes of arbitration.

CONCLUSION.

The writ of certiorari should issue herein because the decision of the Fifth Circuit seriously impairs arbitration in labor management relations by unwarranted judicial intervention. It has dealt a severely crippling blow to the entire process of arbitration in present labor management agreements throughout the nation by adopting a negative presumption in conflict with the expressed positive policy of the Congress and of this Honorable Court.

The decision was reached only by overlooking the clear provisions of the contract affording redress through the grievance-arbitration procedure and making the decision of the arbitrator binding on the parties. The Court seized upon a johnny-come-lately company policy found nowhere in the agreement as an excuse for denying to the arbitrator fundamental power and authority to award a remedy which gives the arbitration process its very meaning and *raison d' etre*.

From the company "no work - - no pay" defense the Fifth Circuit erroneously created an issue on speculation alone, an issue does not and could not exist until and unless violated by an award of an arbitrator.

The Court has interpreted this way of life for these partners in an organic relationship as if it were an ordinary legal document, basing its decision, not on applicable expressions in the field of labor-management relations, but on an ordinary narrow commercial contract.

The decision should be reviewed and reversed.

And so we pray,

GEORGE W. LISKOW,
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Lake Charles, Louisiana;

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Lake Charles, Louisiana,
Attorneys for Petitioner.

Of Counsel:
LISKOW & BOND

CERTIFICATE.

We hereby certify that the above and foregoing petition for writ of certiorari has been served on William R. Tete, Gulf Bank Bldg., Lake Charles, La., and on Keith Blinn, Continental Oil Company, Continental Building, Houston, Texas.

GEORGE W. LISKOW

RUSSELL T. TRITICO

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION No. 6419

REFINERY EMPLOYEES' UNION OF THE LAKE CHARLES AREA

VS.

CONTINENTAL OIL COMPANY

For Plaintiff	Messrs. George W. Liskow P. O. Box 290 Lake Charles, Louisiana
For Defendant	William R. Tete Gulf National Bank Building Lake Charles, Louisiana

HUNTER, JUDGE:

Petitioner (union) entered into a collective bargaining agreement in 1956 with employer (Continental Oil Company), the agreement to run two years and from

year to year thereafter, unless terminated on specific notices. The agreement provided that there would be no strikes, work stoppages, or lock-outs, and that grievances would be handled pursuant to a specified procedure. The last step in the grievance procedure—a step that could be taken by either party—was a request for arbitration in certain instances. The arbitration clause constitutes Section 21-1 of the contract; it reads as follows:

> "21-1 Only differences relating the interpretation or performance of this agreement which cannot be adjusted by mutual agreement, after processing through the grievance procedure may, upon written notice by one party to the other, not later than sixty (60) days after the date of the decision of the regional manager of manufacturing be submitted to arbitration."

> "21-2 The party desiring arbitration shall notify the other party of the matter to be arbitrated, and the name of the arbitrator selected by it, within five (5) days after giving such notice. The other party shall appoint an arbitrator and shall within five (5) days notify the first party of such appointment. The two (2) arbitrators so named shall confer within ten (10) days and attempt to reach an agreement. Should they be unable to agree within five (5) days of their first conference a thir . member shall be selected by these employer and employee representatives. The majority decision of such board of arbitrators so selected shall be rendered within ten (10) days of appointment and shall be binding upon both parties signatory hereto and retroactive to the date

upon which the matter for arbitration was first presented in writing to the superintendent of the refinery as outlined under 19-2."

This controversy involves only one grievance and that concerns one specific work assignment on one specific occasion. The grievance was processed through the various steps in the grievance procedure and the union gave the proper notice requesting arbitration. The union requested that the following issue be submitted to the arbitrator:

> "Did the company's use of employee LeSueur in connection with overtime on the platforming unit of March 3, 1957, violate Section 8 of the collective bargaining agreement between the company and the union? [1]

The company concedes that the Court may properly order it to proceed forthwith under the provisions of Section 21 of its collective bargaining agreement to hear and determine that question, **"PROVIDED, HOWEVER, THAT THE ARBITRATOR'S AUTHORITY SHALL BE LIMITED TO A DETERMINATION OF WHETHER SUCH VIOLATION OCCURRED AND SHALL NOT EXTEND TO THE FORMULATION OF ANY PEN-**

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[1] "8-1 Work peculiar to a classification shall be performed by employees assigned to that classification, except as otherwise provided for in this agreement, but the Company reserves the right to assign to such work available employees regularly assigned to other classifications when necessary for the efficient operation of the plant, provided that employees from the classification to which such work is regularly assigned are not available."

ALTY OR OTHER REMEDY IN THE EVENT SAID QUESTION IS DECIDED IN THE AFFIRMATIVE." [2]

The action is primarily under the provisions of Section 301 of the L.M.R.A. of 1947, 29 U.S.C.A. 185. Relief sought by plaintiff as shown by the prayer is for: a declaration of its rights under Section 21 of the contract; a mandatory injunction to compel defendant to arbitrate certain issues; and relief in the form of what is termed "incidental" damages for failure to arbitrate.

It is now clear that Section 301 of the Act confers power upon the Federal District Courts to compel arbitration in accordance with the terms of a collective bargaining agreement. (Textile Workers Union v. Lincoln Mills, 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. E. Md. 972).

Defendant asserts that just because the dispute is "grievable", it does not necessarily follow that it was also arbitrable and insists that this Court must determine as a matter of law whether there has been any agreement to submit the particular issue in question to arbitration. We agree that this is so. (Engineers Assn. v. Sperry Gyroscope Co., etc., 2nd Cir., 1957, 251 F. 2d 133, and

[2] The record reveals that the company sought to settle the grievance by assigning to the allegedly aggrieved four hours overtime work at the equivalent pay and classification. This offer was refused by the union. The union offered to settle the grievance if the company would pay the allegedly aggrieved for the four hours work the equivalent in money therefor as a penalty for the alleged misassignment. This offer of settlement was refused by the company on the grounds that there was nothing in the contract concerning the payment of wages for work not performed. The company further refused to negotiate relating to the remedies for violations of Section 8 because, as they stated, "the arbitrator would have no contractual criteria to follow, and his reward as to remedy would be beyond the terms of the contract."

Local No. 149, etc. v. General Electric Company, 1st Cir., 1957, 250 F. 2d 922):

THE LINCOLN MILLS CASE

When the Supreme Court of the United States in Lincoln Mills interpreted Section 301 as authority for federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, including the specific performance of arbitration provisions of such agreements, it wisely provided guidance for the lower courts as to the sources from which they might garner some of the more important viscera for the body they were charged with molding. There, the Court set out what might be described as sources of creative inspiration for the lower courts:

First, it noted, "* * * the policy of our national labor laws." Because of the pluralization, we assume this means the principal moving purpose underlying all national laws on the subject.

Secondly, it noted specifically that, "The Labor Management Relations Act expressly furnishes some substantive law."

Thirdly, it noted, "* * * the penumbra of express statutory mandates", which we take to mean the shadow cast by statutes not specifically intended to apply to this particular field but having sufficient elasticity to permit extension by analogy, if not by direct application, to cover some facets of the problem at hand.

Fourthly, it noted, "* * * state law, if compatible with the purpose of Section 301."

Before leaving Lincoln Mills, supra, to explore these sources, it should be observed that, while the Lincoln

Mills case does provide a requisite basis of substantive law for the granting of relief by courts in actions of this TYPE, it does not follow that the case itself is sufficient authority for granting the relief sought under the facts of this case, notwithstanding a superficial similarity between the two. The Supreme Court's holding is simply to the effect that Section 301 of the Act affords a substantive basis for the courts to order the parties to a collective bargaining agreement to submit to arbitration SUCH ISSUES AS THEY MAY HAVE AGREED TO ARBITRATE in said agreement, and subject to such conditions and rules as may be developed from the sources of law previously mentioned. It does NOT hold that there is any basis for requiring arbitration in the absence of such an agreement, NOR DOES IT AFFORD ANY BASIS FOR EXTENDING SUCH AGREEMENTS TO ENCOMPASS ANY ISSUE NOT CONTEMPLATED BY THE PARTIES AS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT. Neither the Supreme Court nor the Fifth Circuit (230 F. 2d 21) passed upon the question of whether or not the dispute itself in Lincoln Mills was arbitrable under the terms of the contract, and although the District Court (the decision of which is unreported) apparently considered it so, the issue does not appear to have been raised. Moreover, nothing is known about the nature of the dispute or the terms of the agreement except for what is paraphrased in the Fifth Circuit's decision (supra). However, it is obvious from that Court's paraphrased reference to the agreement that the arbitration clause **was much broader in scope than its counterpart in the case at bar, which is probably why the company did not raise the issue.**

Thus, bearing in mind that the only significance of Lincoln Mills is to establish a general basis in substantive law for suits of this nature, we turn to a consideration of the sources to which we have been referred for more specific principles of law.

At least, by implication "the policy of our national labor laws" favors restricting arbitration to matters which the parties have agreed voluntarily to arbitrate. Invariably we find stress placed upon the voluntary nature of the proceeding as opposed to the principle of compulsory arbitration. In this connection, *Volume 5 of Commerce Clearing House, Labor Law Reporter, Fourth Edition*, contains the following discussion at *page 51,040*:

> "In discussion and technical study, arbitration can be either voluntary or compulsory. In practice, in the United States, it is overwhelmingly voluntary. It is wholly voluntary on the federal side. There is no federal statute compelling parties to submit their labor disputes to an arbitrator. And this federal avoidance of compulsory arbitration reflects the frequently expressed view of most representatives of both management and labor.
>
> "This emphasis on voluntary arbitration as the desirable and most effective type is reflected strongly in the Taft-Hartley Act (=725). Indeed, with wartime exceptions, federal arbitration law has concentrated on voluntary arbitration ever since 1898 when the Erdman Act, providing for voluntary arbitration of railway labor disputes, replaced the compulsory Arbitration Act of October 1, 1888, 25 Stat. 501—a law that remained a dead-letter

during the ten years it was in the statute books. From 1898 on, general federal law has concentrated on voluntary arbitration. Railway labor dispute arbitration has been voluntary under the Erdman Act, under the Newlands Act of 1913, under the Transportation Act of 1920, and under the present Railway Labor Act. The same emphasis on voluntary agreement marked the labor dispute adjustment agencies of the Depression years—the Industrial Boards of Adjustment that were set up by Presidential executive orders in many industries under the authority of Public Resolution 44 of the Seventy-third Congress.

"Compulsory forced arbitration has been resorted to only in emergency wartime conditions—in the Adamson Act of 1916 which set up compulsory arbitration of railway labor disputes, and in the board jurisdiction of the National War Labor Board during World War II. Compulsory powers of this now-defunct Board stemmed from Presidential executive order—E. O. 9017 of January 12, 1942, 7 F. R. 237—and from the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, Pub. L. 89, 78th Cong., 1st Sess."

In this same connection, the National Labor-Management Conference held in Washington during November 1945, following the end of controls on labor disputes by the War Labor Board, made the following recommendation with respect to arbitration provisions of collective bargaining agreements:

"b. That the impartial chairman, umpire, arbitrator, or board should have no power to add to, subtract from, change, or modify any provision of the agreement, but should be authorized only to interpret the existing provisions of the agreement and apply them to the specific facts of the grievance or dispute."

The same appears to be true from the standpoint of the "substantive law" expressly furnished by "The Labor Management Relations Act", which is the second source to which the court is referred by the Supreme Court's Lincoln Mills law. The Act did establish the Federal Mediation and Conciliation Service specifically to provide assistance to employers and unions in the settlement of labor disputes (29 U.S.C.A. 171-178). However, the arbitration contemplated by the Act is strictly of a voluntary nature and limited to the agreement between the parties. In fact, the *Regulations of the Federal Mediation and Conciliation Service, Part 1404*, dealing with arbitration policies, functions and procedures, as last revised by the Director, effective January 8, 1957, states that the Service prefers to act only upon a joint request and that it may act upon the request of one party only WHERE THE PARTIES HAVE AGREED that either of them may seek a panel of arbitrators. Moreover, Section 1404.5 of said Regulations specifically provides that:

"Where either party claims that a dispute is not subject to arbitration, the Service will not decide the merits of such claim."

(Federal Register, January 8, 1957; 22 Fed. Reg. 162)

The voluntary and strictly contractual nature of the arbitrations contemplated by the Labor Management Relations Act is further evidenced by the fact that the legislative history of the act includes the following statement from the Committee of Conference, House Report No. 510 of June 3, 1947:

> "Section 204 of the Senate amendment stated that it should be the duty of employers and employees, and their representatives, to exert every reasonable effort to settle their differences by COLLECTIVE BARGAINING, and, if this should fail, to utilize the assistance of the Mediation Service. This provision is also included in section 204 of the conference agreement. BUT THERE HAS BEEN OMITTED THEREFROM LANGUAGE WHICH APPEARED IN THE SENATE AMENDMENT WHICH INDICATED THAT THE PARTIES WERE UNDER A DUTY TO SUBMIT GRIEVANCE DISPUTES TO ARBITRATION."
>
> *(U. S. Code Congressional Service, 80th Congress, First Session 1947, page 1169.* Emphasis added).

We turn now to "the policy of the legislation", which we take to mean the policy of the Labor Management Relations Act. This policy is set forth in the Act itself as follows:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when

they have occurred by encouraging the practice and procedure of COLLECTIVE BARGAINING and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of NEGOTIATING the terms and conditions of their employment or other mutual aid or protection."

(29 U.S.C.A. 151; emphasis added).

This policy makes no mention of arbitration, but places the utmost emphasis on COLLECTIVE BARGAINING AND NEGOTIATING the terms and conditions of employment. Was the omission of any reference to arbitration simply an oversight on the part of Congress? That seems unlikely in view of the fact that elsewhere in the Act it established the Federal Mediation and Conciliation Service to provide assistance to unions and employers in arbitrating disputes, as previously discussed herein. However, as previously noted, the Service does not function except where the parties have agreed to arbitrate the particular question submitted, and therein lies the answer to the question of why the policy makes no mention of encouraging arbitration. Involuntary or compulsory arbitration is the antithesis of bargaining and negotiating. Congress recognized this fact and deliberately spurned compulsory arbitration in favor of the collective bargaining-negotiating process. Time and again it has been suggested to Congress that resort should be had to some such means of resolving labor disputes when the parties reach an impasse—particularly where the public weal is apt to suffer as a result of the dispute. However, Congress has never seen fit to change its policy in that connection and

has adhered to the purpose first enunciated. Congressional reasoning has been to the effect that compulsory arbitration is incompatible with the fundamental purpose of the Act itself. In the words of Senator Taft:

> "We did not feel that we should put into the law, as part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. WE FEEL THAT IT WOULD INTERFERE WITH THE WHOLE PROCESS OF COLLECTIVE BARGAINING. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided."
>
> (93 Cong. Rec. 3835-3836 (1947); emphasis added).

This incompatibility of compulsory arbitration with the policy of the Act and Congress' repeated rejection of it was recognized by the Supreme Court of the United States in the case of *Amalgamated Association of Street, Electric Railway & Motor Employees of America vs. Wisconsin Employment Relations Board*, 71 S. Ct. 359; in which it struck down a Wisconsin law requiring arbitration of labor disputes involving public utilities. At page 365 of the reported decision it stated:

> "Like the majority strike-vote provision considered in O'Brien, a proposal that the right to

> strike be denied, together with the substitution of compulsory arbitration in cases of 'public emergencies', local or national, was before Congress in 1947. This proposal closely resembling the pattern of the Wisconsin Act, was rejected by Congress AS BEING INCONSISTENT WITH ITS POLICY in respect to enterprises covered by the Federal Act * * *." (Emphasis added).

At page 367 the same thought is expressed thusly:

> "* * * reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of the national labor policy. * * *"

In view of these expressions and the plain wording of the policy of the Act itself, we can only conclude that our basic premise to the effect that there is no right to arbitrate a dispute unless the parties have specifically so agreed, finds express support in the Labor Management Relations Act.

This brings us to a consideration of the final source to which the district courts are referred, i. e., "state law, if compatible with the purpose of Section 301." Since such state law is usable merely for the purpose of guidance under the Supreme Court's mandate, **this source obviously is not limited to the state law of the forum but includes the laws of all states.** Thus the court may consider not only the laws of Louisiana, but those of any state which may have some bearing on the general subject matter. Called upon, as we are here, to interpret a contract, we may consider the common law of contracts in seeking a rule of in-

terpretation "that will best effectuate the federal policy". This policy is rooted in the fundamental concept of collective bargaining; arbitration agreements are to be encouraged, but compulsory arbitration is odious. To best effectuate these principles district courts must construe the limitations placed by the parties on their agreements to arbitrate "strictissimi juris".

The accepted common law principles to be applied in the interpretation of agreements[3] applicable here are these: (1) Courts give legal effects to contracts as written. However general be the terms in which a contract is couched, it extends only to those things concerning which it appears that the parties intended to contract. The intent is to be determined by the words of the contract when they are clear and explicit and lead to no absurd consequences. It is the common intent that is to be sought, for if there is a difference of intent there is no common consent and no agreement. (2) When there is doubt as to the meaning of certain words, they may be explained by referring to other words and phrases used therein. (3) All clauses of an agreement are interpreted the one by the other, giving to each the sense that results from the entire Act. (4) Courts cannot make contracts for the parties, and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or

[3] "And not incompatible with §301."

that it is necessary to give effect to and effectuate the purpose of the contract as a whole.

The Arbitration Clause

Almost all, if not all, present day collective bargaining agreements contain some sort of arbitration clause. The questions referable to arbitration under the provision of such agreements vary widely. In some instances the parties agree to arbitrate virtually every grievance that arises during the term of the contract, irrespective of the relation of such dispute to the contract provisions. Others are only moderately broad in scope and still others are highly restrictive, limiting the arbitration procedure to questions of interpretation and performance of the specific terms of the contract. It is in this latter category into which the clause before us fits. The pertinent section, 21-1, has been heretofore set out in full and the key language in the clause may be condensed to read as follows, to-wit:

> "Only differences relating to the interpretation or performance of this agreement may * * * be submitted to arbitration."

Here, it is evident that the agreement to arbitrate is restricted to differences relating to the meaning of the terms employed in the agreement and those relating to whether or not the conduct of the parties is in accordance with the specific provisions of the agreement. The plain intention of the parties to restrict the matters referable to arbitration is particularly emphasized by the use of the word "only", which serves no purpose whatever except to accentuate the limited scope of the submission. Thus, a

dispute between the parties as to what constitutes work peculiar to a classification within the meaning of Section 8-1 would certainly be a difference referable to arbitration, if it could not be settled by the grievance procedure provided for in Section 19. Likewise, a dispute as to the assignment or particular work to a particular classification would be referable to arbitration, since it would involve a difference relating to the performance of something agreed upon in the contract. Defendant agrees that this is so and is ready to arbitrate these differences, and accordingly to regard the arbitrator's decision in that connection as final to the end that such assignments under such circumstances will henceforth be made in accordance with the arbitrator's decision.

The dispositive issue is: Have the parties agreed to do more than to abide by the arbitrator's decision relating to the interpretation and performance of the agreement. Specifically, have they agreed to arbitrate the issue of damages or penalty for the violation of Section 8 of the agreement.

Counsel for the union insists that because the question of violation is an arbitrable one it necessarily follows that the arbitrator should have the power to prescribe a remedy. Arguing well, and at length, he asserts:

> "The power merely to decide that an agreement has been violated without power to redress the injury would be futility in the extreme."

It would be, he says, a mere "wrist slapping" procedure. In support of his position, he marshals numerous awards by various arbitrators. Particularly noted are two arbi-

tration decisions by Charles Reynard, Professor of Law at Louisiana State University. The first is that of *Mississippi Aluminum Corporation*, November 14, 1956; 27 L. A. 625. There, the grievance involved the re-scheduling of a maintenance crew from the "normal" work week of Monday to Friday to an abnormal work week of Tuesday through Saturday. The arbitrator held that the company violated the contract and that:

> "The maintenance workers were entitled to time and one-half for all work performed on Saturdays * * * over the company's objection that the contract makes no provision for any penalty for violation of the normal working schedule language of Article 5, Section 3. Similar objections can and sometimes are raised with respect to numerous types of violations, **but arbitrators have uniformly declared that the absence of contractual language imposing sanctions in such cases is no bar to the awarding of compensation.**" (Emphasis added).

The second case is that of International Harvester Company, 9 L. A. 894, where the arbitrator stated:

> "The conclusion that no money arbitration award is proper in the case of violations of contract provisions which do not specifically provide for damages would have two effects. The first would be the substitution of some other method of settlement in the place of arbitration. The second would be the cluttering up of visions which would invite more trouble than they could ever be expected to prevent * * * (Collective bargaining agreements) will lose their effectiveness when they become so

involved that layment cannot possibly follow or understand them. It would contribute dangerously to that tendency if it were required that every contract clause had to include a damages provision. **This is the kind of thing which it must be assumed the parties intended would be handled in the light of the applicability of a particular clause to the particular problems that might arise under it."** (Emphasis added).

A third arbitration decision—the logic of which plaintiff's counsel commends to the Court—is that of Phillips Chemical Company, December 6, 1951, 17 L. A. 721. There, both parties agreed that on a particular day the complainant should have been assigned 5½ hours of overtime work which was mistakenly allocated to another employee. This is what the arbitrator had to say about the remedy and his right to award such a remedy.

"The sole question, is what is complainant's remedy? The union's position is that he is entitled, without doing any work for it, 5½ hours pay at the overtime rate. The company contends that he is entitled to such pay only after having worked 5½ hours overtime on any day which is convenient to him. The company contends that the union is seeking a money penalty; that the agreement does not provide for it; and that therefore such an award would violate the customary prohibition against arbitrators adding to an agreement.

"The purpose of arbitration is to settle disputes justly and fully, as a substitute for strikes and lock-outs. If a grievance has no merit, relief

is denied; but if it has merit, adequate relief should be granted. That is what the parties contemplate. Anything less than that would not effect justice and would not satisfy the complaining party. Therefore, **it is implied in the arbitration section that the arbitration board has power to grant adequate relief. The power merely to decide that the agreement has been violated, without power to redress the injury, would be futility in the extreme.** Furthermore, Article 14 provides 'The arbitration board should have jurisdiction over all the disputes arising under the terms of this agreement;' and jurisdiction means power to grant relief.

"Hence, it is implied that where breach of the agreement has caused a money loss, the board has power to award the proper amount as compensatory damages. A specific clause to that effect would, of course, make that power clearer; but a clause is not essential. Therefore, **making such an award is not adding a term to the agreement; it is merely carrying out the clearly implied purpose of arbitration, viz., to grant proper relief for meritorious grievances.** In the courts, the customary relief is money damages; it is not surprising that frequently in arbitration cases the same relief is required."

These arbitrators' decisions ostensibly support the union's contention here, but we find the arguments therein set out unpersuasive of the narrow issue of this case. The value of arbitration annot be disputed nor should its value be minimized, but we cannot write into this agreement by implication an obligation by either the union or

the company to arbitrate under Section 21 thereof the issue of a penalty or remedy for a violation of Section 8 thereof. There is no satisfactory basis in the express contract to find this obligation clearly within the contemplation of the parties, nor is it necessary to imply such a covenant in order to effectuate the contract as a whole.[1] We limit this conclusion to the specific case before us. If the parties had agreed to arbitrate all grievances the result would be different. If the contract provided a penalty, the result would be different. If the agreement provided that remedies in all grievances should be left to the arbitrator, the result would be different. If the grievance here had been based on other sections of this very contract a remedy would be in order, e. g., Section 14 dealing with vacations; Section 15 dealing with pay for those on jury duty; Section 16 dealing with severance pay; Section 17 dealing with annuities; Section 18 dealing with funeral leaves.[2] But this comprehensive agreement, bearing clear tokens of comprehensive preparation, fails to indicate or suggest an unintentional omission of any provision necessary or essential to carry into full effect the complete understanding of the contracting parties, and it contains no language to be interpreted and applied for determining what an appropriate remedy might be for a violation of Section 8.

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[1] In these clauses there is language to be applied for determining an appropriate remedy, e.g., if there is a dispute as to whether or not a certain employee qualifies for a vacation without pay, the arbitrator certainly has the right to order the company to give the employee a two weeks' vacation with pay.

[2] For analogy only, see Local No. 149 v. General Electric, 250 F. (2d) 923, First Circuit, 1957.

CONCLUSION.

The scope of the arbitration agreement was solely for the parties to determine by collective bargaining. The determination of whether the disputed issues is arbitrable is inescapably for the court and must be determined by an interpretation of the agreement in accordance with applicable substantive federal law to be fashioned by the courts pursuant to the mandate in Lincoln Mills.[6]

We find nothing in the terms of the carefully drawn agreement to warrant a conclusion that the parties to it agreed therein to submit to arbitration the question of a penalty or of an award for a breach of Section 8 thereof. Nor do we find anything in Lincoln Mills and its teachings requiring us, under the facts of this case, to so extend the agreement by implication in order to effectuate federal policy.

Our duty, when called upon to do so, is to enforce collective bargaining agreements on behalf of or against labor unions as they are written. All of our laws governing employer-employee relations have been rooted in the fundamental concept of collective bargaining. Such has been the consistent policy of Congress—a policy reflecting the faith of a nation that its people can best solve their problems and resolve their differences in an intelligent and democratic manner. In countless thousands of cases this system has worked well, unscarred by the bitter economic strife which has accompanied the highly publicized exceptions to the general rule. We are aware of the view-

[6] Justice Frankfurter, in his dissent therein, comments in effect that this federal law "is as yet in the bosom of the judiciary"

point urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator broad powers. This court is not ignoring the force of this argument, but **compulsory** arbitration is an anathema to both labor and management. The one thing that stands out above everything amid all the policy, history, legislative background and jurisprudence surrounding the subject of arbitration is that it must be voluntary to be effective, that compulsion is odious, and that a party should never be required to arbitrate unless he has contracted to so do. Reliance upon third parties to resolve all differences between employer and employee is not a healthy nor a desirable development for the reason that the parties themselves come to exert less and less influence over their own relationship with one another and they assume more or less permanent roles of antagonists vying for such advantages as may be wrung from the arbiters.

Congress, in amending the Labor Management Relations Act to include Section 301, sought to provide a forum for damage suits arising out of breach of collective bargaining agreements. It would be ironic if the federal courts should now read into arbitration clauses a requirement that the question of damages for breach of contract itself must be submitted to arbitration, thus rendering the admitted primary purpose of the Act wholly ineffective for all practical purposes.

The collective bargaining here involved is scheduled to terminate several months from now. The parties may, if they wish, extend the arbitration clause to empower the arbitrator to fix a remedy. They may if they wish amend the contract so as to include the remedy

itself. They may, if they wish, agree that all grievances be arbitrated.

The union is entitled to an order requiring the company to proceed forthwith under the provisions of Section 21 of its current collective bargaining agreement to the appointment of an arbitrator who, in conjunction with the arbitrator to be appointed by the union and such third party as the first two may select, shall hear and determine the following issue:

> "Did the company's use of employee La Sueur in connection with the overtime on the platforming unit on March 3, 1957, constitute a violation of Section 8 of the contract?"

The arbitrator's authority will be limited to a determination of that issue alone and shall not extend to the formulation of any penalty or the fixing of damages in the event such question is determined in the affirmative. The union's claim of incidental damage is based on the company's refusal to arbitrate the penalty and or damage question, and is denied. If the union's position on the issue submitted is sustained by the arbitrators, they (the union) will not be without a remedy. However, if I may be permitted a bit of "wrist slapping", I will add that this union and this company have enjoyed excellent relations and they should certainly adjust their differences here.

Decree will be submitted by defendant after notice.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 2nd day of April, 1958.

UNITED STATES DISTRICT JUDGE
s EDWIN F. HUNTER.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

~~CIVIL NO.~~ 6419

REFINERY EMPLOYEES' UNION OF
THE LAKE CHARLES AREA

vs.

CONTINENTAL OIL COMPANY

JUDGMENT.

Upon consideration of the complaint and answer filed herein and the evidence upon which this case was submitted by stipulation between the parties, and in further consideration of the arguments of counsel, both oral and written, and it appearing to the Court from said representations and evidence that there is a valid and subsisting dispute between the parties as to their respective rights under and by virtue of their collective bargaining agreement of June 13, 1956, and it further appearing that this

Court has full jurisdiction of said dispute under the provisions of Section 301 of the Labor Management Relations Act of 1947 (29 USCA 185), it is upon the basis of the pleadings and the evidence and for the written reasons assigned on April 2, 1958 ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant, Continental Oil Company, is required to proceed forthwith under the provisions of Section 21 of the collective bargaining agreement dated June 13, 1956, to the appointment of an arbitrator who, in conjunction with the arbitrator appointed by the union and such third party as the first two may select, shall hear and determine the following issue:

> "Did the Company's use of employee LeSueur in connection with the overtime on the platforming unit on March 3, 1957, constitute a violation of Section 8 of the contract?"

2. The arbitrators' authority shall be and is hereby limited to a determination of the issue above stated alone, and shall not extend to the formulation of any penalty or the fixing of damages in the event such question is determined in the affirmative.

3. The plaintiff's prayer for incidental damages is based upon the company's refusal to arbitrate the penalty and or damage question and is hereby denied. Costs are to be paid by plaintiff.

THUS DONE, ORDERED AND SIGNED at Lake Charles, Louisiana this 11th day of April, A. D. 1958.

s Edwin F. Hunter,
DISTRICT JUDGE

SUBMITTED BY:

s William R. Tête
William R. Tête
Counsel for Defendant

APPROVED AS TO FORM:

s George W. Liskow
George W. Liskow
Counsel for Plaintiff

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17344

REFINERY EMPLOYEES UNION OF THE LAKE CHARLES AREA,

Appellant,

versus

CONTINENTAL OIL COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(June 25, 1959.)

Before HUTCHESON, Chief Judge, and BROWN and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This appeal concerns the interpretation of an arbitration clause in a collective bargaining agreement. Two questions are raised. (1) Does

the Court have authority to determine arbitrability and in so doing limit the scope of the arbitrable issue to be referred to the arbitrator? (2) Was it the intention of the parties, as expressed in the contract, to submit to arbitration the determination of the remedy for a breach of contract, including authority to award damages for misassigned overtime, contrary to management policy of paying only for work performed?

The Refinery Employees Union of the Lake Charles Area, plaintiff-appellant, and the Continental Oil Company, defendant-appellee, are parties to a collective bargaining agreement. The Union sued for specific performance of the arbitration provision, under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 USCA § 185.[1] Both parties and the trial judge treated the action as a suit for a declaratory judgment.

I.

The agreement regulates, among other matters, observance of craft lines separating the duties of employees in a particular job classification from the duties of employees in another job classification.[2] One of the purposes

[1] Textile Workers Union v. Lincoln Mills, 1957, 353 U. S. 448; Goodall-Sanford, Inc., v. United Textile Workers, 1957, 353 U. S. 550; General Electric Co. v. Local Union 205, United Electrical Workers, 1957, 353 U. S. 547. cf. The Item Co. v. New Orleans Newspaper Guild, 5 Cir. m/s, No. 17,129, decided June 26, 1958.

[2] Section 8, entitled "Job Classification" provides: "8-1 Work peculiar to a classification shall be performed by employees assigned to that classification, except as otherwise provided for in this agreement, but the Company reserves the right to assign to such work available employees regularly assigned to other classifications when necessary for the efficient operation of the

of job classification is to provide a basis for the equable distribution of overtime, because of the premium pay that makes overtime work attractive to employees.

During a night shift at the Lake Charles refinery, March 3, 1957, a dispute arose between the Company's shift foreman and the Union's representative over the foreman's assignment of an employee to work four hours

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plant; provided that employees from the classification to which such work is regularly assigned are not available. Any employee so assigned shall receive the rate applicable to his permanent classification or to the classification to which he is assigned, whichever is higher, except that for less than four (4) hours service, an employee's rate shall not be changed. ¶ 8-2 In an emergency, as defined in 8-7, employees shall be assigned to any work required, without regard to their regular assignment: The pay provisions as outlined above shall apply. ¶ 8-3 Temporary assignments within the operating division, made solely for 'break-in' or training purposes shall be excepted from the pay provisions outlined above. ¶ 8-4 When it is known that the absence of any permanently assigned employee within any operating progression unit will exceed two (2) days, and when such absence created the need for replacement, the vacancy will be filled by the qualified employee next in line within the progression unit. When such procedure is impractical because of the unavailability of employees adequately trained to advance, the vacancy shall be filled from within the job classification in which it occurs. The moves will be accomplished as quickly as rescheduling is practical. ¶ 8-5 In the event an operating vacancy is expected to exist for two (2) days or less, it may be filled by 'splitting the shift'. ¶ 8-6 No foreman or supervisor who is exempt under the Wage-Hour Law shall perform any work peculiar to any classification or craft in which employees are non-exempt under the Wage-Hour Law, except in the event of an emergency or for training purposes. This does not limit the right of a supervisor to transport men or materials in a vehicle used in the process of supervision. ¶ 8-7 An emergency for the purpose of 8-2 and 8-6 hereof is defined as a situation which constitutes a hazard to life or property or which results from any order of the United States Government, state or local authority. ¶ 8-8 Hourly employees assigned as supervisors will not be paid at a rate equal to or less than the rate of the employees they supervise. ¶ 8-9 No exempt foreman will

overtime in a job that did not fit into his permanent classification, to the detriment of another employee who was allegedly entitled to that particular overtime assignment because of his job classification. March 13, after discussions in which the Company agreed that the foreman had made a mistake, the Union representative filed a formal grievance, requesting four hours pay for the aggrieved employee, "since his four hours were taken away from him and given to another classification".

March 18 the Company replied, "regretting the error" and promising to make every effort to see that this type of mistake would not be repeated but refusing to pay anything to the aggrieved employee, because "it is the policy of the Company to pay only for work performed."

A number of letters were then exchanged between the Company and the Union. The Company changed its position from admitting having made a mistake to arguing that the terms of the agreement referring to permanent or temporary assignment are vague, that the shift foreman was confronted with an emergency, that anyway he tried to call an employee in the proper classification who was off duty, thereby showing good faith, and that the employee who did perform the work received premium

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be called out to do maintenance work when a craftsman from the craft is available except in emergencies. "8-10 It is agreed that any classified work covering maintenance, operation or repair of refinery equipment now being done by employees of the Company shall not be contracted out as long as the Company has the equipment and the necessary qualified employees available from among present or laid off employees. It is the intent of this paragraph that when the Company has the necessary qualified employees of the craft concerned, they shall be upgraded before resorting to contract labor."

pay. But the Company insisted on maintaining its policy of *no work—no pay*. The Union charged that the Company was guilty of "a deliberate violation of the terms of our signed agreement" and that the improper work assignment was one of a long series of such violations; "management [says] 'we are sorry', and the infractions continue". There were more letters. The Company offered to make concessions in order to end the dispute. It was willing to give the aggrieved employee "four hours overtime work as Cat Reformer Controlman 1st . . . to be 'made work', not vacation or sick relief . . . [so that his] assignment will not reduce any overtime conceivably worked by another employee". Still the Company would not budge from its policy of paying only for work performed.

The proposed solution was unsatisfactory. The Union invoked arbitration. The Company agreed to arbitration, "provided, however, that the arbitrator's decision shall be limited to a determination of whether such violation occurred and if the arbitrator shall determine that such violation occurred, the remedy shall be the subject of negotiation between the company and the union". The Union rejected the Company's proposed limitation on the arbitration. The Union called it "an attempt in very bad faith by the company to avoid coming to grips with the real problem". The real problem, said the Union, was "difference of opinion as to the award rather than a difference of opinion as to the error committed". The Union stated that:

> "It is our position that the question of whether or not the arbitrator has the right to make an award is a matter of interpretation of the contract to be

made by the . . . arbitrator. . . . [T]he interpretation of the contract [is] a matter to be left to the arbitrator."

As a last "effort to find an amicable basis for settlement . . . [the Company] offered to permit [the aggrieved employee] to work four hours any time selected by him at the applicable rate of pay". The Company "refuse[d] to arbitrate on the question of pay for work not performed, since it related neither to the interpretation nor performance of the contract". The Union then filed a suit for specific performance of the arbitration clause.

It is apparent on the face of these letters, that there was never any serious dispute as to the underlying problem of whether the Company's shift foreman had violated the work assignment provisions of the agreement. Moreover, the Company was willing to make the aggrieved party whole by giving him additional work at the equivalent pay and classification. The serious dispute was whether the Company should pay what in effect is a penalty and is contrary to its policy against payment for work not performed, in the absence of a provision in the contract awarding damages or requiring payment for work not performed.

The Union contends that determination of the remedy, including payment of damages, is implicit in arbitrating grievances; that this is a matter for arbitrators, not courts, the power to arbitrate an underlying problem carrying with it the power to dispose of the whole problem. The Union asserts that the district court went into the merits of the grievance, foreclosed any indepen-

dent decision by an arbitrator, and put the Union in a position of having a right without a remedy.

The district court held that "the determination of whether the disputed issues is arbitrable is inescapably for the court". It could "find nothing in the terms of the carefully drawn agreement to warrant a conclusion that the parties to it agreed therein to submit to arbitration the question of a penalty or of an award". The district court held that although the Union was entitled to an order requiring the Company to proceed with arbitration of the issue of work assignment, "the arbitrator's authority will be limited to a determination of that issue alone and shall not extend to the formulation of any penalty or the fixing of damages". We affirm.

II.

The Union now concedes, contrary to its position in the district court, that arbitrability of a grievance, meaning the underlying problem, is a preliminary question within the province of the court. The Union contends however that the court may go that far and no farther; that in this case the court could not restrict the arbitration to a decision as to whether there was a violation of the contract and could not prohibit the arbitrators from awarding damages; an arbitrator's authority is for arbitrators to decide.

This amounts to saying that a court may order parties to arbitrate, but cannot tell the arbitrator what to arbitrate.

We cannot accept such a proposition. Private arbitration fits in well with responsible industrial self-

government and is favored by the courts.[3] But whether an issue is an arbitrable one is a legal question for the court rather than for the arbitrator. *Lodge No. 12, International Association of Machinists v. Cameron Iron Works*, 5 Cir., 1958, 257 F.2d 467, cert. den. 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed.2d 110; *Engineers Association v. Sperry Gyroscope Co.*, 2 Cir., 1953, 251 F.2d 133; *International Union UAW v. Benton Harbor Malleable Industries*, 6 Cir., 1957, 242 F.2d 536; *Local No. 149, American Federation of Technical Engineers v. General Electric Company*, 1 Cir., 1957, 250 F.2d 922, cert. den., 1958, 356 U.S. 938, 78 S.Ct. 780, 2 L.Ed.2d 813; *United Steelworkers of America v. American Manufacturing Co.*, 6 Cir., March 19, 1959, F.2d ; 36 Labor Cases (CCH) Par. 65,300. The power to determine arbitrability carries with it the power to define and limit the arbitrable issue. See *Council of Western Electric Technical Employees v. Western Electric Company*, 2 Cir., 1956, 238 F.2d 892, and *Boston Mutual Life Insurance Co. v. Insurance Agents International Union*, 1 Cir., 1958, 258

[3] See Gorske, Arbitration Back-Pay Awards, 10 Lab. L. J. 18 (1959); Comment, Arbitration Union Section 301(a), 59 Col. L. R. 153 (1959); Murphy, Current Trends in Labor Arbitration, 11 N. Y. U. Conf. On Labor, 231 (1958); Kramer, Arbitration Under the Taft-Hartley Act, 11 N. Y. U. Conf. on Labor, 255 (1958); Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 604 (1954); Feinsinger, Enforcement of Labor Agreements—A New Era in Collective Bargaining, 43 Va. L. Rev. 1261, 1274 (1957); Frey, The Proposed Uniform Arbitration Act Should Not Be Adopted, 10 Vand. L. Rev. 709 (1957); Howard, The Proposed Uniform Arbitration Act: Yes or No, 22 Mo. L. Rev. 999, 1024 (1955); Kharas & Koretz, Judicial Determination of the Arbitrable Issue in Labor Arbitration—Some Recent Developments, 7 Syracuse L. Rev. 193, 195-8 (1956); Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 692-99 (1957); Summers, Judicial Review of Labor Arbitration or Alice Through the Looking Glass, 2 Buffalo L. Rev. 1, 3-13 (1952).

F.2d 516. Even giving the "broadest liberalities" to private arbitration, parties to a contract cannot be forced to arbitrate an issue they did not agree to arbitrate. "[W]hen one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise." *Local No. 149, etc. v. General Electric Co.*, 1 Cir., 1957, 250 F.2d 922, cert. den. 1958, 356 U.S. 938, 78 S.Ct. 780, 2 L.Ed.2d 813.[4]

The process of deciding just what the parties did agree to arbitrate brings the court to a definition of the of the arbitrable issue. That definition marks the jurisdictional boundaries of the arbitration tribunal and necessarily limits the authority of the arbitrators.

The plaintiff's pleadings support these views. The plaintiff moved for a summary judgment on the ground that it was "entitled as a matter of law to a judgment ordering the defendant to proceed with arbitration of the grievance without limitation on the arbitrator to provide and order a remedy for breach of contract as set forth in said grievance". This motion directly raised the preliminary question of the arbitrator's authority. The district court was confronted squarely with the question: does the arbitrable issue include, "without limitation", matters

[4] Judge Magruder for the First Circuit, reaffirmed this holding in Boston Mutual Life Insurance Co. v. Insurance Agents International Union, 1 Cir., 1958, 258 F. (2d) 516, reversing the holding of Judge Wyzanski (161 F. Supp. 222) strongly relied on by the appellant in this case.

relating to the remedy for breach of contract as set forth in the grievance? Faced with the question by the plaintiff's motion, it was proper for the trial court to decide it.

To the extent that a court excludes as non-arbitrable the real bone of contention, here the remedy, not the underlying dispute, of course the court forecloses the arbitrator's determination of the merits of the non-arbitrable issue. But that is an inevitable consequence of the difference of opinion between the Court and the Union as to what is arbitrable under the contract. *Boston Mutual Life Ins. Co. v. Insurance Agents' Int. Union*, 1 Cir., 1958, 258 F.2d 516. There is no disservice to the principle of arbitration and no denial of the expertise of arbitrators on the merits of the grievance, if, as we think, the arbitrable grievance is limited to the question of whether the overtime work was assigned in accordance with proper job classification.

A contract is before us, a firm agreement presumably made after the usual labor-management negotiations. It is important to labor[5] and management to have a collective bargaining agreement enforced according to the intention of the parties, shielded against the risk of an arbitrator's abuse of authority arising out of a possible predilection for arbitration. The parties are free to bargain as to the width of the coverage of an arbitration clause but, in the absence of an express provision allowing the arbitrators to decide arbitrability, courts must determine the scope of the arbitration clause and, when appropriate, as in this case, set guideposts

[5] For example, to resist claims for damages based on alleged violations of the no-strike clause.

for the arbitrators to follow. On the facts in this case, a judicial determination now of the arbitrable issue, with some metes and bounds, seems more likely to promote industrial peace and more likely to lead to settlement of the real dispute in the proper forum (at the bargaining table) than judicial abnegation based on broad (and vague) policy grounds.

III.

The difficult question in this case is whether the district court correctly limited the arbitrable issue in holding that the parties to the collective bargaining contract did not intend to submit to arbitration the remedy for misassignment of overtime work, including authority to award wages for work not performed.

This Court is committed to the policy that "private arbitration in the labor-management field is to be afforded broad liberalities". *Lodge No. 12, International Association of Machinists v. Cameron Iron Works*, 5 Cir., 1958, 257 F.2d 467, cert. den., 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed.2d 110. But this policy does not permit the Court to find agreement where there is no agreement.

The arbitration clause in the case at bar[6] is not a

[6] Section 21, entitled "Arbitration," provides: "21-1 Only differences relating to the interpretation or performance of this agreement which cannot be adjusted by mutual agreement, after processing through the grievance procedure may upon written notice by one party to the other, not later than sixty (60) days after the date of the decision of the regional manager of manufacturing be submitted to arbitration. 21-2 The party desiring arbitration shall notify the other party of the matter to be arbitrated, and the name of the arbitrator selected by it, within five (5) days after giving such notice. The other party shall appoint an arbitrator and shall within five (5) days

broad grant of authority to the arbitrators,[7] a *quid pro quo* for giving up the right to strike. The Union ex-

notify the first party of such appointment. The two (2) arbitrators so named shall confer within ten (10) days and attempt to reach an agreement. Should they be unable to agree within five (5) days of their first conference a third member shall be selected by these employer and employee representatives. The majority decision of such board of arbitrators so selected shall be rendered within ten (10) days of appointment, and shall be binding upon both parties signatory hereto and retroactive to the date upon which the matter for arbitration was first presented in writing to the superintendent of the refinery as outlined under 19-2. 21-3 The expense of the arbitrator selected by the Company shall be borne by the Company; the expense of the arbitrator selected by the Union shall be borne by the Union; and the expense of the third arbitrator, if such is selected, shall be borne by the Company and the Union equally."

[7] Compare the arbitration clause recommended by the American Arbitration Association: "The American Arbitration Association recommends the following general arbitration clause in labor agreement; 'Any dispute, claim or grievance arising out of or relating to this agreement shall be submitted to arbitration under the Voluntary Labor Arbitration Rules, then obtaining, of the American Arbitration Association. The parties agree to abide by the award, subject to such regulations as any Federal agency having jurisdiction may impose. The parties further agree that there shall be no suspension of work when such dispute arises and while it is in progress of adjustment or arbitration.'" Dept. of Labor Bull., 908-16, at p. 858. "Even though an arbitration clause covering only 'disputes concerning the interpretation and application' of the collective agreement cannot mean barely the translation of words, it must impose some limit. The phrasing of the arbitration clause is often an important issue in collective bargaining. Experienced negotiators are thoroughly aware of their ability to choose between the comparatively narrow clause noted above and a wide-open undertaking to arbitrate 'any dispute, difference, disagreement or controversy of any nature or character' which may arise during the term of the agreement. When the former clause is selected, the company believes that a limit has been imposed upon the power of the arbitrator. . . . The contrast between the wide-open clause and the conventional phraseology is too plain to put down to inadvertence. The apparent purpose is to confine the power of the arbitrator. Apparently the parties choose it because

pressly reserved the right to strike during the term of the agreement.[8] The arbitration clause in question is a limited clause that does not purport to cover "any or all" disputes. It covers: "*Only* differences relating to the interpretation or performance of this agreement". The contract is silent as to the remedy, if any, for misassigned overtime. The arbitration clause is silent as to the power of arbitrators to provide a remedy or to impose a penalty.

The underlying problem as to whether the overtime work was assigned to an employee in the proper classification is plainly a difference expressly covered by the arbitration clause. The real dispute as to whether the Company should pay for time not worked, as a penalty imposed on the Company to discourage future violations, is plainly not covered in the contract—unless, giving a broad interpretation to the arbitration clause, the Court should hold that the authority of an arbitrator to make

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one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposition of significant obligations not contemplated by the agreement and quite beyond its scope. The clause does not tell what the arbitrator should not do. It tells what he cannot do." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1483, 1500, 1509 (1959).

[8] Section 22-1 of this collective bargaining agreement, which is the section dealing with strikes and lockouts, provided: "22-1 The Union and its members, individually and collectively, will not, during the term of this agreement, cause, permit, or take part in any strike, picketing, sit-down, stay-in, slow down, or other curtailment or restriction of production or interference with work in or about the Company's refinery or premises until the procedure provided herein for the settlement of grievances has been complied with nor thereafter until sixty (60) days after a majority of all employees in the bargaining unit have, by a secret strike vote, approved the strike and the Union shall have so certified in writing to the Company."

awards and fix damages is implied in the arbitration of every grievance.

In *Marchant v. Mead-Morrison Mfg. Co.*, 1929, 252 N.Y. 284, 169 N.E. 386, 390, a case decided when he was on the Court of Appeals of New York, Mr. Justice Cardozo stated some fundamental principles we think are applicable in the instant case, even though a commercial arbitration was involved:

> "The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others. . . . Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention. A submission so phrased, or in form substantially equivalent, does not limit the authority of the arbitrators to an adjudication of the breach. It is authority to assess the damages against the party in default."

The arbitration clause in question was similar to the arbitration clause before us:

"It does not say that any and all controversies growing out of the contract shall be settled by arbitration, though the plaintiff would have us hold that its effect is nothing less. The submission is to be confined to controversies or differences of opinion as to 'the construction of the terms and conditions' of the contract, and controversies or differences as to the 'performance' of the contract. . . . We think there was no intention to clothe the arbitrators with power to settle every difference having its genesis in the contract. Their function was more modest. Questions might arise as to the meaning of the contract or the plans and specifications. The arbitrators were to give the answer. Questions might arise as to the performance of covenants and conditions where there was no doubt as to the meaning. Again the arbitrators would answer. . . . They did not limit themselves to fixing the value of what had been done as compared with that omitted, according to the practice in recoupment. Mondel v. Stell, 8 M. & W. 858. They charged the dilatory seller with consequential damages of nearly $1,000,000, on the ground that the effect of the delay was to plunge the buyer into ruin. . . . It is not a question whether the damages awarded proceed from the default so directly and certainly that the plaintiff might have recovered them if he had been suing in the courts. The judgment of the arbitrators within the lines of the submission is not to be impeached for misconception of the law. It is rather a question whether the damages are of

such a nature that arbitrators so commissioned may consider them at all."

There is a difference between arbitration of a commercial dispute and arbitration of a labor dispute. That difference is not so great when there is a limited arbitration clause, as in this case. In *Marchant v. Mead-Morrison* the court found that the parties did not intend to arbitrate "every difference having its genesis in the contract", but only differences as to the "construction" and "performance" of the contract.[9] Such a submission withholds from the arbitrators authority to give consequential damages. Citing this case as authority, several courts have held squarely that "unless the arbitrator is [expressly] given the power to award damages . . . an award attempting to do this is void as beyond the power of the Board [of arbitrators]". *Lone Star Cotton Mills v. Thomas*, 1959, Tex. Civ. App. 227 S.W.2d 300. *Guidry v. Gulf Oil Corporation*, Tex. Civ. App., 1959, 320 S.W.2d 691, is to the same effect. "It is not lawful for arbitrators to fix damages arising out of the matters submitted to them unless the issue of such damages is also specifically submitted". *Publishers' Association v. New York Typographical Union No. 6*, 1938, N.Y.S.Ct., 5 N.Y.S.2d 847.

The precise question at issue, however, has not been decided in any reported decision, as far as our research

[9] In Marchant v. Mead-Morrison the court found a limited submission. In later cases, New York courts have held that when an arbitrator is given power to decide a controversy in its entirety, "any and all controversies," the arbitrator has an implied power to award damages. Matter of Utility Laundry Service, 1949, 90 N. E. (2d) 178, 300 N. Y. 255.

goes.[10] In *United Electrical, Radio & Machine Workers of America v. Miller Metal Products*, 4 Cir., 1954, 215 F.2d 221 and in *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 4 Cir., 1948, 168 F.2d 33, the court held that claims for damages for breach of a no-strike clause are not arbitrable, since the arbitration clause contemplates matters subject to the grievance procedure and not such controversies as strikes and secondary boycotts which are entirely foreign to the

[10] Few arbitrators, however, have had any doubts as to the extent of their jurisdiction in awarding damages for breach of contract. International Harvester Company, 1947, 9 L.A. 894; Standard Lime and Cement Company, 1956, 26 L.A. 468; Bridgeport Grass Company, 1952, 19 L.A. 690; International Harvester Company, 1950, 14 L.A. 430; Ingersoll-Rand Company, 1947, 7 L.A. 564; Bethlehem Steel Company, 1947, 7 L.A. 493; United States Rubber Company, 1949, 13 L.A. 840; Phillips Chemical Company, 1951, 17 L.A. 721; Mississippi Aluminum Corporation, 1956, 27 L.A. 625; Vanette Hosiery Mills, 1951, 17 L.A. 349; American Machine and Foundry Company, 1950, 15 L.A. 822. Various reasons are given: (1) the company must be given a penalty, to discourage future contract violations; (2) the job classification and work assignment provisions are valueless, unless an award (damages) is given for their breach; (3) like any other contract violation or tort, damages are inseparably connected with the claim; (4) the aggrieved employee, in an overtime case, is entitled to work the overtime hours when they are available, not at some later time. Some arbitrators have held, however, that equivalent work at the same pay is the proper means of disposing of the dispute since it "satisfies the dominant intention of the parties" and enables the error to be "equitably rectified." Celanese Corporation of America, 1954, 24 L.A. 168; Goodyear Atomic Corporation, 1956, 27 L.A. 634.

The International Harvester Company decision is considered the leading case on the authority of arbitrators to make money awards. In this case employees were given new piecework assignments but were not informed of the piece-work price until after they had worked on them some time. The contract required that employees be notified of the rate in advance. The arbitrator held that the employees were entitled to be paid at average earnings rather than at the price on the jobs involved. The case has a special bearing here

grievance procedure. "It would have been possible", Judge Parker held in *Colonial Hardwood*, "for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this, and the rule noscitur a sociis applies to the arbitration clause in the grievance procedure to limit its application to controversies to which the grievance procedure was intended to apply". A similar result was reached with reference to a claim for consequential damages in a contract clause referring to a dispute over hiring and transferring employees. *Council of Western Electrical Technical Em-*

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because the decision was based in part on the company's practice (policy) in the past of making adjustments on the basis of average earnings. The case did not involve payment for work not performed. The language of the arbitrator has been quoted in a number of cases and legal articles: "The conclusion that no money arbitration award is proper regarding contract provisions which do not specifically provide for it would have two effects. The first would be the substitution of some other method of settlement in the place of arbitration. The second would be cluttering up of the contract with a lot of 'liquidated damage' provisions which would invite more trouble than they could ever be expected to prevent. It will be unfortunate if collective bargaining agreements develop along the lines of the revenue laws, with provision necessarily being made for every little hair-line question which may arise between adverse parties pressing conflicting interests. They will lose their effectiveness when they become so involved that laymen cannot follow or understand them. It would contribute dangerously to that tendency if it were required that every contract clause had to contain a damages provision. This is the kind of thing which it must be assumed the parties intended would be handled in the light of the applicability of a particular clause to the particular problems that might arise under it."

Phillips Chemical Company, 1951, 17 L.A. 721 was an arbitration of a claim for overtime. "The purpose of arbitration is to settle disputes justly and fully, as a substitute for strikes and lock-outs. If a grievance has no merit, relief is denied; but if it has merit adequate relief should be granted. That is what the parties contemplate. Anything less than that would not effect justice and would not satisfy the complaining party. Therefore, it is implied in the arbitration section that

ployees National v. Western Electric Co., 2 Cir., 1956, 238 F.2d 892. In these and other cases that might be cited, the federal courts have been fully aware of the force of the considerations supporting a broad commitment of labor disputes to arbitration, but have adhered firmly to the principle that remedies (damages) are not arbitrable unless there is clear contractual authority for their arbitrability. See especially *Local No. 149, etc. v. General Electric Company*, 1 Cir., 1957, 250 F.2d 922, 926.

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the arbitration board has power to grant adequate relief. The power merely to decide that the agreement has been violated; without power to redress the injury, would be futility in the extreme. Furthermore, Article 14 provides 'The arbitration board should have jurisdiction over all the disputes arising under the terms of this agreement;' and jurisdiction means power to grant relief. ¶ Hence, it is implied that where breach of the agreement has caused a money loss, the board has power to award the proper amount as compensatory damages. A specific clause to that effect would of course, make that power clearer, but a clause is not essential. Therefore, making such an award is not adding a term to the agreement; it is merely carrying out the clearly implied purpose of arbitration, viz., to grant proper relief for meritorious grievances. In the courts, the customary relief is money damages; it is not surprising that frequently in arbitration cases the same relief is required."

The Mississippi Aluminum, 1956, 27 L.A. 625, case involved rescheduling a maintenance crew from a normal work week on Monday to Friday to an abnormal week of Tuesday to Saturday. The arbitrator held that the crew should be paid time and a half for Saturday.

Vanette Hosiery Mills, 1951, 17 L.A. 349 was a piece-work case. "The Company insists that back pay cannot be awarded in any event under the Agreement (except under Section 7), because there is no clause providing therefor; citing the case of Lone Star Cotton Mills v. Thomas, 227 S.W. (2d) 300 [14 L.A. 826] . . . . [T]he Agreement goes further than the cited case, where the provision was, arbitration should 'decide and settle the matter,' which the court held gave the arbitrators merely power to say whether the contract was breached. The Agreement here provides (Section 9, paragraphs 1 and 2) for

The contract in the instant case covers forty-two pages, detailing wages and hours of work, overtime, premium time, shifts and shifts differentials, job classification, seniority, craft seniority preference lists, military leave, holidays, vacations, jury duty, severance notice and pay, annuities and benefits, funeral leave, griev-

'decision by arbitration' and 'a decision on the grievance'—which sounds much like the cited case—and then goes further (paragraph 3) by providing for 'enforcing this contract.' This express provision can mean, in many instances where the Agreement has been breached by wrongful action, nothing less than the awarding of back pay."

Celanese Corporation of America, 1954, 24 L.A. 168 concerned a dispute over misassigned overtime. The Company practice (policy) had been to offer equivalent work at the same pay, not to pay for work not performed. The arbitrator held: "The procedure that the Parties set up, in the beginning of 1953, to apply Article 11, Subdivision (e) of the Contract in this Department, did not include or refer to any method to correct any errors in the procedure agreed upon. Subdivision (e) of Article 11 does not prescribe any method—it simply provides that 'overtime shall be distributed as equally as possible.' Unless the Parties had agreed to a single method, the method offered by the Company in this case satisfies that provision equally, as does the method sought by the Union. How the Parties themselves have construed or applied a contractual provision, which is ambiguous or which is stated in general terms, as Section 11, Subdivision (e) is, in this case, constitutes an important factor in finding out what they intended under that provision. 'Past practice' in applying such a provision, provides material facts to determine what the Parties intended."

In Goodyear Atomic Corporation, 1956, 27 L.A. 634, the arbitrator held: "We now come to the matter of McConnell. It follows from the preceding analysis that he should have been given an overtime turn on March 3, 1956. But it does not automatically follow, as the Union argues, that he therefore be compensated for time lost. On the one hand, retroactive compensation for overtime lost is tantamount to payment for work not done; and that could spell an undue burden on the Company. On the other hand, an error in overtime allocation a corresponding amount of overtime can be equitably rectified by providing overtime for the aggrieved employee, provided such overtime is provided within a reasonable time from the date of the error."

ance procedure, arbitration, strikes and lock-outs, working conditions, and other matters. With all of that, there is no list of job classifications and rate ranges and, as in *Local No. 149 v. General Electric Company*, "no language by way of job descriptions which could be interpreted or applied for the purpose of determining whether the duties performed by a particular employee fall within any particular grade". It is unlikely that the omission was accidental. It seems to us that such a contract, involving a large, complicated, modern refinery, contemplates play in the joints—a number of instances when there will be disagreement between company and union as to job classification. The refinery cannot cease operating while the parties decide what employee should do a particular job. Instead, the company representative assigns the work according to his best judgment and if the assignment is incorrect, as the Union might see it, the question may be settled by the grievance procedure and arbitration. The settlement of a job classification is sufficient justification in itself for resort to arbitration. There is no reason to assume that the parties must have intended a penalty to be implied in order to make the contract operative. And there is no basis for asserting that without damages the union has a right but not a remedy: the remedy is settlement of the classification or proper assignment. The union is not in the position of an ordinary private litigant asserting a claim for breach of contract. Here, for example, as we read the correspondence between the Union and the Company, whatever interest the particular aggrieved employee may have had in receiving equivalent work at the same pay, instead of damages, was lost in the shuffle, overriden by

the company-union struggle over the principle of paying for work not performed.

Section 8-1 provides that "work peculiar to a classification shall be performed by employees assigned to that classification". Nowhere in Section 8 is there any provision for a penalty or for damages for a misassignment. But a remedy is expressly provided or probably implied in other sections of the contract, such as those dealing with vacations, jury duty, severance pay, annuities, and funeral leaves. Section 5-7, dealing with overtime, states: "It is the intent of the Company to equalize overtime among employees of the same job classification insofar as it may be practical." This provision declares that the Company intends to equalize "overtime" (work) but it imposes no absolute obligation, refers to no remedy, and contains no inference that damages will be awarded in case of misassignment. (In making this statement, and in the opinion generally, this Court is not passing on any remedy the aggrieved employee or the Union may have for misassigned overtime work. That issue is not before us. We are simply pointing out that the contract contains no express or implied provision covering a money award for misassignment of overtime, from which might be drawn the inference that the remedy was a matter of "interpretation" or "performance" of the contract and therefore an arbitrable issue.)

We return to our starting point. The Company did not agree to submit all differences to arbitration but "only differences relating to the interpretation or performance" of the agreement. The Company policy is against paying two employees for overtime worked by one.

Granted broad approval of arbitration, this Court must consider whether the parties intended a third person to alter basic Company policy through the medium of an arbitration procedure. The correctness of the work assignment is a matter of concern to the individual aggrieved employee. It is also a matter of concern to a union interested in strict observance of craft lines and generally equal distribution of overtime benefits. But subjecting the Company to punitive damages in order to discourage future misassignments and overturning the Company's policy of paying only for work performed goes beyond rectifying individual grievances and beyond the ordinary arbitrative process. There is not much of a contract between the parties and there is not much stability of the company-union relationship, if an important term may be added to a contract and a fundamental change made in the operation of a plant because a dispute is traceable to its genesis in an individual grievance.[11]

[11] In Textron, Inc., Esmond Mills and Textile Workers Union of America (CIO) 1949, 12 L.A. 475 the union requested severance pay for workers discharged when one of Textron Mills was closed. The arbitration clause was broad. It allowed "any dispute, difference, disagreement or controversy of any nature or character . . . to be referred by either party to arbitration". The arbitrator held that the claim to severance was not arbitrable: "Despite my conviction that on equitable grounds there is much merit to the Union's request for severance pay, I am compelled as an arbitrator to give careful consideration to the parties' rights under their collective agreements. Granted the broad nature of the arbitration clause in this agreement, one must nevertheless consider whether the parties intended to permit a third party, through the medium of the arbitration clause, to drastically alter the basic nature of their contractual commitments. I cannot believe this to be the case. The substantive contract issues are contained in the parties' agreement which was drawn for a specific period. It could hardly be deemed an agreement if there could be constant additions to its basic terms by virtue of new demands carried to arbitration during its life. One of the basic purposes of a

The real difference between the parties is over the company policy: no work—no pay. The bone of contention between the Company and the Union is whether a mistake in work assignment should be rectified by damages to the aggrieved employee or by equivalent pay for work performed. This is an over-all labor-management issue that involves, on the one hand, efficient plant management and the economics of production, and, on the other hand, protection of an individual worker through union organization. The proper forum for settlement of the dispute is the bargaining table. The proper persons to make the settlement are the representatives of the Union and the Company, not some third arbitrator.[12] So, at least, was

collective agreement is to furnish stability to the parties' relationship by defining the limits of their rights and obligations. This end is hardly served by a holding that additions to the structure of their relationship of an unknown and unforeseen character can constantly be carried to arbitration during the agreement's existence."

[12] In Douds v. Local 1250, Retail Wholesale Department Store Union, 2 Cir., 1949, 173 F. (2d) 764, Judge Hand referred to a Fifth Circuit holding that grievances "must be understood to be limited to questions of minor importance." Hughes Tool Co. v. National Labor Relations Board 5, Cir., 1945, 147 F. (2d) 69. On rehearing he felt that Elgin, Joliet & Eastern Ry. Co. v. Burley, 1945, 325 U. S. 711, confirmed this view on the principal matter, and, in this case, Mr. Justice Rutledge distinguished between disputes concerning the making of collective agreements and those over grievances or interpretations. "The first relates to disputes over the formation of collective agreements or efforts to secure them," continued Justice Rutledge. "They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. The second class, however, contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning of proper application of a particular provision

the intention of the parties as we read the contract we are required to interpret. In reaching this conclusion we have sought to escape the binds of a narrow, stultifying construction of a legal document. We have sought to construe the contract as a collective bargaining agreement to be read in the context of (1) the collective bargaining process, (2) the background of the particular dispute, (3) the nature of labor arbitration, and (4) the mandate of the Supreme Court in Lincoln Mills.

Judgment is AFFIRMED.

HUTCHESON, Chief Judge, Concurring specially:

I concur fully in what is said and held, and the way in which it is said and held, in the majority opinion, including the use made of footnote 12, which our dissenting brother does not like, and, but for his animadversions and admonitions evoked by what he regards as our obdurate refusal to follow the teachings of his dissenting opinion in *Lincoln Mills v. Textile Workers*, 230 F.(2) 89, 91, I should be content. Since, however, apparently on the basis of the success in the Supreme Court of his dissenting opinion in the Lincoln Mills case, he has in this opinion set himself up as general critic and censor of the court in the field of arbitration, I feel it my right and duty, as one who was not in the Lincoln Mills case

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with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created in the future."

and whose withers are therefore unwrung by it, to speak up. Deprecating the ebullient enthusiasm of my younger brother as pioneer, teacher and guide in the role of judicial activist, which he seems to have assumed, I venture to suggest to him that before taking too seriously his role of leader in our court of an activist movement to deride and destroy the ancient landmarks of the law, he take a little time off to read and reflect upon these words from one of the great English legal historians:

> "Philosophical speculation about law and politics is an attractive pursuit. A small knowledge of the rules of law, a sympathy with hardships which have been observed and a little ingenuity, are sufficient to make a very pretty theory. It is a harder task to become a master of Anglo-American law by using the history of that law to discover the principles which underlie its rules, and to elucidate the manner in which these principles have been developed and adapted to meet the infinite complexities of life in different ages. Such students of our law will learn even though at second hand, something of the practical wisdom which comes from knowledge of affairs. They will for that reason be able to suggest solutions of present problems which will depend not merely on their own unaided genius, but on the accumulated wisdom of the past." Holdsworth, Some Lessons from Our Legal History, 105.

BROWN, Circuit Judge, dissenting:

Perhaps I see more in this case than my Brothers. But, while I can enthusiastically adopt so many portions

of the opinion, especially parts. I and II, I think in the final analysis that what they do is the same old effort to sugar-coat what, to the judiciary, has long been a bitter pill—the idea that someone other than a court can properly adjudicate disputes; that in the field of human disputes lawyers and ex-lawyers as judges alone have the Keys to the Kingdom. Of course, the approach of many jurisdictions which, with jealous eye, scanned all such devices lest they infringe upon or oust the Courts from their historic role, was long ago rejected for Federal Courts. To this notion Judge Hough, in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, S.D.N.Y., 1915, 222 Fed. 1006, 1007, retorted: "A more unworthy genesis cannot be imagined." See also *Lincoln Mills of Alabama v. Textile Workers Union, CIO*, 5 Cir., 1956, 230 F.2d 81, 89, 92 (dissenting opinion), note 7 and related text. But the feeling has a hardy tenacity and decisions of this kind are the transfusions that give a few more days, or years, to an idea that has long since earned a decent interment.

To reach this result the Court seizes onto a single case involving a commercial, not a labor-management, dispute, *Marchant v. Mead-Morrison Mfg. Co.*, 1929, 252 N.Y. 284, 169 N. E. 386, and then drags in, see note 12, though wholly irrelevant, the supposed distinction between "major" and "minor" disputes flowing from the unique situation under the Railway Labor Act, 45 USCA 151 et seq., by which jurisdiction is divided between the Railway Adjustment Board and the Mediation Board. As to Justice Cordoza's observations in the first, much water has since gone over the dam, not the least of which is the command that Federal Courts under Section 301 have the re-

sponsibility and duty to fashion a suitable Federal jurisprudence. *Textile Workers Union v. Lincoln Mills of Alabama*, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. Exercising this judicial inventiveness would require that we at least give something more than deferential footnote citation, see note 10, to a respectable and substantial body of reported arbitration decisions as a source of learning and enlightenment.

Running through the Court's opinion is the idea that a supposed policy of "no work—no pay" is evidence of an intent not to allow a third party to award damages. Of course, the fact of this case, as the Court acknowledges, is that a worker had a right to a specific task; the company wrongfully deprived him of it; what he seeks is what he would have earned at it. A court of law would award him no less and would pay scant heed to the suggestion that this was paying for work not done. Everyone who risks a claim of breach of contract understands that if a court rejects his denial of breach, he may end up paying twice. He will find no judicial succor on the plea that this is punitive.

The idea of a person deciding a controversy so that his decision may then become the subject of a new and further one—i.e., controversy in bargaining—is repugnant to the scheme of an orderly disposition of disputes before they ripen into the seeds of industrial conflict.

Here, three years later, we are back where we were in *Lincoln Mills*. There I stated that this court had concluded "that the court with power is yet powerless to proceed—it has power but no tools—in short, the door is open

but the hall is empty." 230 F.2d 81, 89. Perhaps today the hall is filled. But what takes place is mere stage acting since the players are engaged in a mere academic exercise, debating fiercely and resolving decisively, but actually delivering nothing further than the outline of tomorrow's controversy. The fight begins, then, after leaving the hall.

I therefore respectfully dissent.

APPENDIX C.

JUDGMENT

Extract from the Minutes of June 25, 1959

No. 17,344

REFINERY EMPLOYEES UNION OF THE LAKE CHARLES AREA

versus

CONTINENTAL OIL COMPANY

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Refinery Employees Union of the Lake Charles Area, and the sureties on the cost bond herein, M. A. Neely and George Baukman, Jr., be condemned, in solido,

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Chief Judge, Concurring Specially."

"Brown, Circuit Judge, dissenting."

APPENDIX D.

National Labor Relations Act, 29 U.S.C. 185

Title III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to

have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[redacted] COPY

LIST OF
CONFIDENTIAL
COMPANY IN
OPPOSITION

LE COPY

Office-Supreme Court, U.S.
FILED
OCT 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 417

REFINERY EMPLOYEES UNION OF THE LAKE CHARLES AREA, *Petitioner*

v.

CONTINENTAL OIL COMPANY, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CONTINENTAL OIL COMPANY IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR CONTINENTAL OIL COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B, p. 56) is reported at 268 F. 2d 447. The opinion of the United States District Court for the Western District of Louisiana (Pet. App. A, p. 30) is reported at 160 F. Supp. 723.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1959 (Pet. App. C, p. 85). The petition for a writ of certiorari was filed on September 21, 1959. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). Jurisdiction is invoked on the grounds that:

(1) There is sharp conflict and irreconcilable confusion in the decisions of the lower Federal Courts on the issues of law in question; and

(2) The specific issues here are important questions of federal law which have not been but should be decided by this Court; particularly since the inference, tenor and implication of this case is in conflict with the national policy delineated by this Court in the case of Textile Workers v. Lincoln Mills.

QUESTIONS PRESENTED

This case involves a suit for a declaratory judgment and a mandatory injunction to compel the Respondent, which had a collective bargaining agreement with Petitioner (now expired) to submit to arbitration a certain dispute which arose between them during the term of said agreement. The questions presented are:

1. Does there exist any real basis for invoking the jurisdiction of this Court?

2. Should restraints be imposed on the federal courts in the function of determining the arbitrability vel non of disputes arising from collective bargaining contracts?

3. Do the broad liberalities to be afforded arbitration agreements under the Lincoln Mills decision require enlarging the scope of the sub-

mission to include authority for the arbitrator to grant awards not agreed upon by the parties?

STATUTES INVOLVED

Section 301 of the National Labor Relations Act (29 U.S.C. 185) is set forth in the appendix to the petition at pages 87 and 88.

STATEMENT OF THE CASE

On June 13, 1956, the parties entered into a two-year collective bargaining agreement [1] which, like most of such agreements, as distinguished from ordinary commercial contracts, sought to establish in addition to wages, hours and certain specific working conditions, a set of general principles which would serve as guideposts in the conduct of their day to day relations with one another. One such principle involved was the observance of craft lines or lines of demarcation between the duties of employees in one job classification and those of employees in another, but which duties were not described in detail.[2]

During the night shift on March 3, 1957, a dispute arose between the Shift Foreman and the Union's representative with respect to the assignment of an employee in a particular classification to a particular job, following the development of a mechanical difficulty which necessitated an immediate decision by the Shift Foreman, who at that hour had the full responsibility for running the entire plant.[3] Absent any means

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[1] Tr. p. 6 (Exhibit "A," Agreement between Continental Oil Company and Refinery Employees Union of the Lake Charles Area)

[2] Section 8 of Exhibit "A," Tr. p. 6

[3] Exhibit "E," Tr. p. 11

of resolving the difference immediately the Shift Foreman assigned the work according to his own judgment. Subsequently a grievance was filed by the Union under the provisions of Section 19 of the collective bargaining agreement,[4] claiming the work had been assigned to the wrong classification and demanding four hours pay for an employee in the other classification who had not been called out.[5]

In the course of the grievance procedure the Company offered to accept the Union's view as to the classification to which such duties should be assigned, despite the lack of previous agreement as to specific duties and the existence of circumstances at the time the dispute arose[6] that might have brought the particular incident within the purview of Section 8-2 of the collective bargaining agreement,[7] even if there had been a complete understanding as to such duties and a deviation therefrom in the first place.

Further, in the spirit of compromise, the Company offered to make certain other adjustments, including a special work assignment that would give an employee in the other classification an equivalent amount of overtime work,[8] but the Union rejected all alternatives and remained adamant in its demand that the Company pay for time not worked as a penalty for having differed with the Union's view in the first instance.[9]

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[4] Supra, Note 1

[5] Exhibit "B," Tr. pp. 6-8

[6] Exhibit "E," Tr. p. 11

[7] Supra, Note 1

[8] Exhibit "H," Tr. p. 16

[9] Exhibit "L," Tr. pp. 22-24

At this point it became apparent that there were two disputes involved. One involved a question of determining to which of two classifications a particular job should be assigned under circumstances such as those that existed on March 3, 1957. The other involved a question of whether or not the Company should be compelled to pay a monetary penalty in the event the first question should be resolved in accordance with the Union's view.

As these disputes were processed all the way through the grievance procedure the Company continued to be willing by way of compromise to accede to the Union's view as to the classification to which such work should be assigned. This left only the latter question in dispute.

The Union then sought to invoke the arbitration process, which is provided for in a separate Section of the agreement and limited in scope.[10] But instead of presenting the issue as a question of whether or not the Company was obliged to pay a monetary penalty in such instances, the Union sought to couch the submission in the language of the first dispute.[11] The Company agreed to submit the ostensible question to arbitration but insisted that the submission be couched in language that would exclude the dispute as to penalties not encompassed in the contract and therefore not considered an arbitrable dispute.[12]

The Union then brought this suit for a declaration of its rights under the contract and an injunction that

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[10] Exhibit "A," pp. 37 and 38, Tr. p. 6

[11] Exhibit "I," Tr. p. 18

[12] Exhibit "J," Tr. p. 19; Offer of Judgment, Tr. p. 32

would compel the Company to submit both questions to arbitration.

By stipulation between the parties the case was submitted on the pleadings, including the exhibits that formed a part of petitioner's complaint.[13]

The Courts below determined the issue from the stipulated record and in declaring the rights of the parties and refusing the injunction held that the question of work assignments presented an arbitrable issue but that the question of penalties did not.[14]

ARGUMENT

I.

THAT NO REAL CONFLICT EXISTS AS A BASIS FOR INVOKING THE JURISDICTION OF THIS HONORABLE COURT.

The first of Petitioner's three stated reasons for invoking the jurisdiction of the Supreme Court is that "there is sharp conflict and irreconcilable confusion in the decisions of the lower Federal Courts on the issues of law in question." [15] In an effort to substantiate this position, Petitioner cites cases purporting to illustrate that some courts in determining arbitrability hold that they are confined merely to determining the *type* of dispute the parties agreed to submit to arbitration and whether or not the particular dispute is of that *type*.[16] Petitioner then cites other cases purporting to illustrate that other courts hold that in determining

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[13] Tr. pp. 39-40

[14] Pet. App. p. 52 (District Court); Pet. App. pp. 78-79 (5th Circuit)

[15] Pet. App. p. 2

[16] Pet. App. p. 10, Note 15

arbitrability they must review the *facts* on which the grievance is based in the light of the applicable contract provisions.[17] An examination of these cases, however, will reveal that Petitioner's alignment of cases is purely arbitrary, that none of the courts have taken the position attributed to them by Petitioner, and that in fact there is an underlying consistency in all of the decisions that belies the existence of any genuine conflict.

By and large Respondent has no quarrel with Petitioner's position to the effect that the Courts should predicate their decisions upon a determination of (1) what type of disputes the parties have agreed to submit to arbitration and (2) whether or not the particular dispute falls into that category. That is a sound general rule and is precisely the one which the Circuit Courts have followed in all of the cases cited by Petitioner, save one which was decided upon the basis of a well established exception to the general rule.

The fallacy of Petitioner's argument lies in its failure to analyze properly the *manner* in which the Courts have made and *must* make this fundamental determination. How are the Courts to determine what type of disputes the parties have agreed to submit to arbitration and whether or not the dispute in question is of that type? Obviously, they must first examine the particular arbitration clause. If that clause is sufficiently broad to cover any and all disputes that might arise between the parties during the term of the contract, without limitation, or specifically includes the matter at issue, there is no necessity to look further. By the same token if the arbitration clause should provide that *no* disputes would be arbitrable or should

[17] Pet. App. p. 12, Note 17

specifically exclude the matter at issue, there would be no necessity to look further. However, if that clause limits the disputes that are arbitrable to disputes over matters concerning which the parties have agreed and contracted, the Court must then examine the nature of the dispute in the light of the contract as a whole in order to determine whether or not the dispute concerns such a matter. This does not entail an interpretation of the contract nor an examination of the merits of the dispute. If there has been an agreement as to the subject of the particular dispute, then it is for the arbitrator to determine the merits of the dispute. On the other hand, if the subject of the dispute is nowhere encompassed in the agreement, there is nothing to interpret, nothing to apply and therefore nothing for the arbitrator to decide. In such cases, the Courts need not consider the merits of the dispute at all, because such consideration is unnecessary for the purpose of determining arbitrability. They simply find that the arbitrator likewise cannot consider the merits of the dispute because the issue is not one that the parties agreed to submit to arbitration. All of this simply adds up to the Court's determining the scope of the arbitration agreement, which the parties themselves have set.

This was the method employed by the First Circuit in the case of *Local 149 Engineers v. General Electric Company*,[18] as well as in the case of *Local 201 IUE v. General Electric Company*.[19] An examination of the arbitration clause revealed that the type of dispute which

[18] Local No. 149 of the American Federation of Technical Engineers (AFL) v. General Electric Company, (1st Cir.), cert. denied, 356 U.S. 938, 78 S. Ct. 780 (1958).

[19] Local 201, International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al. v. General Electric Company, 262 F. 2d 265 (1st Cir. 1959)

the parties had agreed to submit to arbitration was limited to those involving the interpretation and application of the agreement. An examination of the nature of the dispute and the contract as a whole revealed that the particular dispute at issue involved a subject that the parties had not reached any agreement upon. Therefore, there was nothing to interpret or apply so the dispute could not be one that the parties had agreed to submit to arbitration.

This method was also employed by the First Circuit in the case of *Boston Mutual Life Insurance Company v. Insurance Agents.*[20] The Court examined the arbitration clause and found that a condition precedent limited its scope to matters in which a timely appeal was made to arbitration. Thus, although the initial dispute was clearly arbitrable, the dispute before the Court involved the collateral question of timeliness, which had to be resolved before the arbitration clause could be applicable to any dispute. Examination of this question in the light of the contract as a whole revealed that it was not such a question as the parties had agreed to submit to arbitration. There was no determination by the Court of the merits of the dispute. The scope of the arbitration clause simply precluded arbitration of the question.

The same method was again employed by the First Circuit in the case of *New Bedford Division v. Local 1113.*[21] The Court examined the arbitration clause and

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[20] Boston Mutual Life Insurance Company v. Insurance Agent's International Union (AFL-CIO), 258 F. 2d 516 (1st Cir. 1958)

[21] New Bedford Defense Products Division of The Firestone Tire & Rubber Company v. Local No. 1113 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW, AFL-CIO), et al., 258 F. 2d 522 (1st Cir. 1958).

found it limited to questions arising out of interpretation and application of the contract. It considered the nature of the dispute and found that it involved a subject upon which the parties had contracted and agreed. Accordingly, notwithstanding the fact that the Union's claim appeared to be meritless on its face, the Court eschewed a determination of the merits and referred the matter to arbitration.

To a discerning reader it is thus apparent that all of the decisions of the First Circuit cited by Petitioner were predicated upon the same general rule espoused by Petitioner, but that the result in each case simply varied according to the particular arbitration clause, the nature of the particular dispute and the terms of the particular contract, all of which were examined in order to determine the basic questions posed by the said general rule.

Strangely enough, although Petitioner urges that these cases are in conflict with each other and with this Court's decision in *Lincoln Mills*,[22] the First Circuit itself seems to have found no such conflict. In fact in each of the decisions subsequent to *Local 149 Engineers v. General Electric Company*[23] (supra) its earlier decisions were cited by the Court to show the consistency of its position. Moreover, in Petitioner's district court supplemental brief Petitioner itself defended the First Circuit's original decision (which Petitioner now contends is the genesis of all error) as having been in harmony with *Lincoln Mills*. Thus it appears that the only real inconsistency lies in Peti-

[22] Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448; 77 S. Ct. 912 (U.S. S. Ct. 1957)

[23] Supra, Note 18

tioner's approach to the problem, which might well be born of an understandable desire simply to have this particular case again reviewed.

The Fifth Circuit's decisions likewise follow the same general rule and pattern. In *Machinists Association v. Cameron Iron Works*[24] and in *The Item Company* v. *Newspaper Guild*[25] the Court considered the same factors in concluding that the disputes involved were such as the parties had agreed to submit to arbitration. In both cases it was virtually conceded that the disputes were both expressly and impliedly within the ambit of the arbitration clauses and the only issue before the Court was whether or not the agreements were in effect at the time the disputes arose or whether time or circumstances had vitiated the respective agreements. In the case at bar, where the arbitration clause expressed a limited scope as to the type of dispute the parties had agreed to submit to arbitration and the subject of the dispute in question was not found to be encompassed by the contract as a whole, the same result could not be reached. But the Court specifically pointed this out and preserved the basis of its previous decisions by noting:[26]

> "This Court is committed to the policy that 'private arbitration in the labor management field is to be afforded broad liberalities.' (Citing Cameron Iron Works). But this policy does not per-

[24] Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 237 F. 2d 467 (5th Cir. 1958).

[25] The Item Company v. New Orleans Newspaper Guild, 256 F. 2d 855 (5th Cir. 1958)

[26] Pet. App. pp. 66-68

mit the Court to find agreement where there is no agreement.

> "The arbitration clause in the case at bar is not a broad grant of authority to the arbitrators, a quid pro quo for giving up the right to strike. The union expressly reserved the right to strike during the term of the agreement. The arbitration clause in question is a limited clause that does not purport to cover 'any or all' disputes. It covers '*Only* differences relating to the interpretation or performance of this agreement.'"

So it is that the Fifth Circuit too has followed consistently the general rule viewed with favor by Petitioner. In making the fundamental determination of (1) what type of disputes the parties had agreed to submit to arbitration in the case at bar the Court first examined the particular arbitration clause and found it narrow in scope and restricted to differences relating to the interpretation or performance of the particular contract. It then examined the nature of the dispute to determine (2) whether or not it was the type covered by the arbitration clause. Since the dispute involved the imposition of a penalty nowhere encompassed by the agreement, the Court could only conclude that this was not the type of dispute that the parties had agreed to submit to arbitration. The result was different from that obtained in the Fifth Circuit's two preceding cases but only because the arbitration clause was different, the nature of the dispute was different and the contract as a whole was different—not because of any difference in the fundamental principles applied.

The other cases cited by Petitioner as illustrative of alleged "conflict" and "confusion" follow the same

pattern, some turning primarily on the broad language of the arbitration clause;[27] Others turning primarily on the nature of the dispute and the contract as a whole.[28] In only one case did a Circuit Court actually consider the dispute on the merits and refuse to order arbitration. It did so, however, on the basis of a well established exception to the general rule. This exception holds that the courts of equity will not compel arbitration of claims that are frivolous and patently baseless.[29] In this connection there may well be a difference of opinion as to whether or not the Court properly applied the rule of exception to that particular case. But the rule itself is one of long standing in the application of various state arbitration laws[30] to which the Federal Courts are referred for guidance by the Supreme Court's opinion in *Lincoln Mills*. Hence, in the absence of any indication that it may be indiscriminately applied, isolated cases where this exception is invoked should give rise to no alarm.

Thus viewed in the light of their true underlying rationale, respondent submits that there is no genuine conflict in the line of cases set up by Petitioner to

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[27] Butte Miners Union No. 1 of International Union of Mine, Mill and Smelter Workers v. The Anaconda Company (159 F. Supp. 431). At page 434 the Court remarked:

"Broader arbitration provisions than those contained in the collective bargaining agreements between plaintiffs and defendant are difficult to imagine."

[28] Engineers Association v. Sperry Gyroscope Company, Division of Sperry Rand orporation, 251 F. 2d 133 (2d Cir. 1957)

[29] United Steelworkers of America v. American Manufacturing Company, 264 F. 2d 624 (6th Cir. 1959).

[30] Annotation, 24 ALR 2d 762, 764

illustrate its first reason for invoking the jurisdiction of the Supreme Court of the United States in the case at bar. Each case involved a different dispute, a different contract and a different arbitration agreement. These differences naturally gave rise to difference in the specific reasons assigned by the courts for compelling or not compelling arbitration. However, in each case the Court followed the mandate of the Supreme Court in *Lincoln Mills* and arbitration was ordered or refused depending upon whether or not the issue was one which the parties had agreed to arbitrate. Where the contract conferred broad powers upon the arbitrator and the particular dispute was not otherwise excluded, effect was given the intent of the parties and arbitration was ordered. Where the arbitration clause was restrictive and the subject of dispute not elsewhere covered by the contract, the Court likewise gave effect to the intent of the parties and refused to order arbitration. In short, the decisions in the main are in complete harmony with *Lincoln Mills* and with each other. In fact, the same Courts which Petitioner accuses of deciding issues on the merits on the one hand have handed down other decisions which the Petitioner finds consonant with the Supreme Court's mandate on the other.

There is still another thread of consistency which runs through all of these decisions. That is, while the Courts have acted to give full effect to agreements to arbitrate, where such agreements actually exist, they have not compelled the parties to arbitrate issues which they have not agreed to refer to arbitration. They have recognized the fact that in order to encourage the use of voluntary arbitration they must exercise care not to extend such agreements beyond their intended scope.

for to do so would inject an element of compulsion that would surely discourage the use of arbitration as much, if not more, than the situation that existed prior to *Lincoln Mills*. The judicious care with which the Courts have considered each agreement as a separately negotiated Labor-Management contract between different parties attests to the seriousness with which the federal judiciary as a whole has accepted the responsibility placed in its hands by the Act of the national Congress as illuminated by this Court in *Lincoln Mills* and other decisions. True, it would perhaps be easier to apply some arbitrary rule equating the existence of any arbitration clause at all with a presumed intention of the parties to submit all disputes to arbitration, irrespective of other provisions of the contract which militate against such a presumption. However, the effect of this latter course would be to cause the parties to hold back from collective bargaining on those matters concerning which they might hope to obtain greater concessions under the auspices of an arbitrator. This was the danger adverted to by Senator Taft in the statement quoted by the District Court in the case at bar with reference to compulsory arbitration.[31]

In the case at bar, as in other cases where arbitration has been denied, the Union has sought by this method to expand the contract in its favor without having to bargain for its objective.[32] It is to the everlasting credit of the Circuit Courts of Appeal that they have not

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[31] Pet. App. p. 41

[32] Local 201, International Union of Electrical, Radio and Machine Workers AFL-CIO, et al v. General Electric Company (Supra, Note 19). In this case the Union had sought to obtain shift preferences based on seniority during contract negotiations and having failed to obtain such concession by collective bargaining, attempted to utilize the arbitration process to the same end.

permitted this abuse of the Supreme Court's forward step in *Lincoln Mills*. In short, the Courts below uniformly have enforced agreements to arbitrate that encompassed the subject of dispute and have refused to compel arbitration where the issue was not thus encompassed, and in so doing have encouraged both collective bargaining and the use of voluntary arbitration.

Where, then, is the conflict that allegedly exists? Where is the confusion of which Petitioner complains? Respondent submits that there is no conflict except that which Petitioner creates with cleverly turned phrases, false labeling of issues and the introduction of arbitrary presumptions designed to enable it to obtain by compulsory arbitration concessions that it has not been able to obtain by collective bargaining.

II.

THAT THE AUTHORITY OF THE FEDERAL COURTS TO DETERMINE ARBITRABILITY OF DISPUTES ARISING FROM COLLECTIVE BARGAINING AGREEMENTS UNDER SECTION 301 OF THE LMRA SHOULD NOT BE LIMITED BY THE IMPOSITION OF AN ARBITRARY PRESUMPTION.

The second reason advanced by Petitioner as a basis for invoking the jurisdiction of this Court is that there is an important question of federal law which has not been, but should be, decided by the Supreme Court.

The gist of this reasoning is found in Petitioner's argument that "Implicit in the theory of arbitration is the fundamental authority of the arbitrator to award a remedy unless explicitly denied such authority by the contract." [34] Petitioner seeks to elevate that theory to an important question which should be decided by this

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[34] Pet. App. p. 2

[34] Pet. App. p. 17, et seq.

Court by urging that the establishment of such a presumption as a matter of Federal law is essential to effectuate the congressional policy of the LMRA.[35]

Taking Petitioner's contention literally would mean that arbitrators should be vested by law—through the technique of a presumption—with the authority to grant *any* remedy not explicitly excluded by the agreement. The impact of such a presumption would place a burden upon the parties of anticipating every conceivable award that might be considered remedial by every arbitrator to whom any dispute might be submitted. The patent impossibility of the parties being able to anticipate and exclude explicitly every such eventuality would necessarily result in the de facto removal of some questions from the area of collective bargaining and substituting some degree of compulsory arbitration. This would be especially true in the thousands of instances in which existing contracts have been negotiated without consideration of such a presumption. That is not to say that the converse is true and that by virtue of an arbitrary negative presumption the arbitrator should have no power to award any remedy not explicitly expressed. Again the burden of anticipating every eventuality would be so great as to discourage arbitration agreements in labor-management contracts. Moreover, the effect would be to vitiate existing agreements negotiated without knowledge of any such presumption.

As the matter now stands, it is generally conceded that under many agreements to arbitrate the arbitrator has some implied authority. The scope of such au-

[35] Labor Management Relations Act of 1947, 29 USC § 141, et seq.

thority is not always the same and it is for the Courts to decide the scope of the submission on the basis of the agreement. It is possible, of course, for the parties to grant as much authority or as little in this connection as they might deem prudent or expedient. However, absent any specific agreement giving the arbitrator unlimited authority, that which is implied should not be extended beyond the terms of the contract.

In other words, the scope of the arbitrator's authority to require remedial action, *when implied*, has been and must be limited to the relief or remedy afforded by the terms of the contract. Otherwise, it would know no bounds. The arbitrator could direct the discharge of supervisors, the increase of wage rates, or, for that matter, the operation of the plant by a board of union trustees, if in his opinion such action would be remedial.

The existence of such implied authority *within the limits stated* is not denied. However, in the case at bar it should be noted that the remedy demanded by the Union, which constituted the real grievance and the only one that the Court did not compel the Respondent to refer to arbitration, was the payment of a penalty not provided for in the contract and the arbitration clause being restrictive in nature [36] and limited as to retroactivity, [37] could not be said to have contained such an implied grant.

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[36] Section 21-1 of the contract (Exhibit "A," Tr. p. 6) provides:

"Only differences relating to the interpretation or performance of this agreement•••may•••be submitted to arbitration."

[37] Section 21-2 of the contract (Exhibit "A," Tr. p. 6) provides:

"The•••decision•••shall be•••retroactive to the date upon which the matter for arbitration was first presented in writing to the superintendent of the refinery•••"

Respondent submits that virtually all of the reported decisions to date have vindicated the trust placed by this Honorable Court in the courts below to fashion federal law that will effectuate the policy of our national labor laws. Almost with exception they have exercised this authority judiciously and attempted by all reasonable means to give effect to the intent of the parties. In so doing they have resorted to inferences where such inferences could be drawn reasonably from the contract between the parties and have eschewed rigid presumptions where they were manifestly insupportable. In short, the courts below have encouraged voluntary arbitration by letting the parties set the scope of their arbitration agreements without the imposition of undue burdens and the introduction of artificial concepts. This careful accommodation of the federal policy by the courts precludes the existence of any important question of federal law necessitating a decision by this Court in this connection.

III.

THAT THE DECISION IN THE CASE AT BAR IS NOT IN CONFLICT WITH THE NATIONAL POLICY DELINEATED BY THE SUPREME COURT IN LINCOLN MILLS.

The third reason submitted by Petitioner as a basis for invoking the jurisdiction of this Court is the contention that the tenor and implication of the decisions below in this case do violence to this Court's decision in Lincoln Mills.[*]

This argument is predicated upon the refusal of the courts below to apply Petitioner's presumption of arbitrability to the dispute about penalties in the case at bar. Petitioner contends that the decision creates

[*] Pet. App. p. 2

the presumption that an arbitrator has no power to make a money award in any case unless such power is specifically provided for in the contract and that this is contrary to the tenor and implication of *Lincoln Mills*.

To say that no powers are granted an arbitrator save those specifically enumerated would be as unrealistic and unjust as to say that all powers are granted save those specifically excluded. To impose either view as a rigid and arbitrary presumption would be certain to discourage arbitration agreements for the reasons previously discussed. But notwithstanding Petitioner's tortured interpretation the Fifth Circuit has done neither by virtue of its decision in this case. The plain import of the language employed by the Fifth Circuit in several instances [39] was to the effect that the power to resolve the issues as to the remedy sought could have been implied or inferred *if there had been anything in the contract upon which such implied power could have been predicated.* However, besides the absence of any express inclusion of such power there were express provisions that militated strongly against such a broad grant of authority.

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[39] The following is quoted from the opinion of the Fifth Circuit at page 77, Pet. App. (Emphasis added):

"But a *remedy* is expressly provided or *probably* implied in other sections of the contract, such as those dealing with vacations, jury duty, severance pay, annuities, and funeral leaves ... "We are simply pointing out that the contract contains no express *or implied* provision covering a money award for misassignment of overtime•••"

"This provision declares that the company intends to equalize 'overtime' (work) but it imposes no absolute obligation, refers to no remedy, and contains no *inference* that damages will be awarded in case of misassignment."

In the first place, the language of the arbitration clause was markedly restrictive.[40] In the second place, the Union had not abrogated its right to strike during the term of the agreement.[41] In the third place, there were no specific job descriptions agreed upon in the contract.[42] And in the fourth place, the arbitration clause specifically precluded any decision by an arbitrator that would relate back or be retroactive to the date of the alleged misassignment.[43] Although not adverted to by the Court below the effect of this latter provision would make it impossible for the particular assignment giving rise to the initial dispute to be affected in any way by the arbitrator's decision. It could not be converted into a "breach of contract" or a "wrongful act" in the ordinary sense of the word because the arbitrator's decision would be retroactive only to the date that the grievance was presented in writing to the superintendent of the refinery—some eighteen days after the alleged misassignment took place. Hence, the arbitrator could not possibly have the implied power to assess a penalty in this case. He could simply resolve the dispute as to which classification should be assigned the work in question.

Just as the language employed by the Circuit Court of Appeals indicated that in other cases a broader power might be implied, so did the opinion of the District Court leave ample room for an implied grant of authority to arbitrators to make a monetary award

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[40] Note 36, supra

[41] Tr. p. 6 (Exhibit "A," Section 22, p. 39)

[42] Note 1, supra

[43] Note 37, supra, and Tr. pp. 9 (Exhibit "D")

in appropriate cases where the contract might be such as to support a reasonable presumption to that effect.

The foregoing should serve to demonstrate that the Petitioner is simply crying "wolf" with respect to its contention that the decision in the case at bar creates a presumption that the arbitrator has no power to make a monetary award in any case unless such power is specifically provided for in the contract.

In the same connection it should be noted that the contract before the Court in the *Lincoln Mills* case expressly stated that "The Board of Arbitration shall have the right to adjust compensation retroactive to the date of any change." [9] Hence, there was no necessity

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[9] The following is quoted from the District Court's opinion at page 49, Pet. App., with emphasis added:

"There is no satisfactory basis in the express contract to find this obligation clearly within the contemplation of the parties nor is it necessary to imply such a covenant in order to effectuate the contract as a whole. *We limit this conclusion to the specific case before us. If the parties had agreed to arbitrate all grievances the result would be different. If the contract provided a penalty, the result would be different. If the agreement provided that remedies in all grievances should be left to the arbitrator, the result would be different. If the grievance here had been based on other sections of this very contract a remedy would be in order, e.g., Section 14 dealing with vacations; Section 15 dealing with pay for those on jury duty; Section 17 dealing with severance pay; Section 17, dealing with absences; Section 18 dealing with funeral leaves.* But this comprehensive agreement, bearing clear tokens of comprehensive preparation, fails to indicate or suggest an unintentional omission of any provision necessary or essential to carry into full effect the complete understanding of the contracting parties, and contains no language to be interpreted and applied for determining what an appropriate remedy might be for a violation of Section 8."

[10] Textile Workers Union of America v. Lincoln Mills of Alabama (77 S Ct. 912, at page 919)

for this Court to indulge in any presumption whatsoever on that score. Moreover, Respondent submits that there is nothing in the tenor or implication of this Court's decision in *Lincoln Mills* that would suggest any intention of requiring the parties to a collective bargaining contract to submit any dispute to arbitration not encompassed within the scope of the particular agreement. On the contrary, it prudently was given to the federal courts below to fashion the substantive law from the policy of our national labor laws, which encourages voluntary arbitration but abjures compulsory arbitration. Both the district court and the court of appeal took full cognizance of the light shed upon such national laws and national policy by the said opinion of this Court and followed that decision carefully in letter and in spirit, and, lest the decisions should be misconstrued as any indication of departure from the general course charted by this Court in *Lincoln Mills* and subsequently followed by the Fifth Circuit in *Cameron Iron Works* and *The Item Company* cases, these courts both made it abundantly clear that their decisions were confined to this particular case, this particular dispute, this particular arbitration clause and this particular contract.

In that Petitioner charges the Fifth Circuit with seeking to reverse the Supreme Court by giving mere lip service to *Lincoln Mills*, even in the face of Petitioner's own approval of that Court's decisions in *Cameron Iron Works* and *The Item Company* cases, it attacks the integrity of that Court, which is patently unjustified. But, by suggesting that the tenor and implication of the *Lincoln Mills* decision was to the effect that the courts below should read *into* labor contracts an intent to arbitrate all disputes wherever there is an

agreement to arbitrate some disputes and to that extent to force an agreement where there is none, which would be manifestly repugnant to our national policy. Petitioner shows little respect for the judicial function of the Supreme Court itself.

IV.

THAT PETITIONER'S OTHER COMPLAINTS REGARDING THE DECISIONS OF THE COURTS BELOW ARE UNJUSTIFIED.

Aside from the more basic issues hereinabove discussed, Petitioner seems to have four other complaints regarding the decisions rendered in the case at bar in the district court and the court of appeal.

First it charges that the courts invaded the province of the arbitrator and decided the issue on the merits. This charge is utterly without foundation and is based upon sheer sophistry. The facts of the original grievance were never passed upon or even considered by either Court. The question of whether or not the disputed work was actually misassigned was left open for arbitration. No issue in this connection was really raised since Respondent stood willing at all times to submit it to arbitration. The only real issue before the Court was whether or not the question of damages was arbitrable and the Courts below simply held that there was no agreement between the parties to submit that question to arbitration. They did not hold, as well they might, that damages could not accrue or be assessed as result of a misassignment of work by virtue of the provision previously quoted, which limits the retroactivity of the arbitrator's finding to a point in time some eighteen days after the particular assignment in question. Both lower Courts merely held that the question was not one that the parties had agreed to

submit to arbitration. Petitioner simply equates the adverse decision as to the *arbitrability* of this question with a decision of the *merits* just as it equates the *encouragement* of arbitration with *forcing* an agreement to arbitrate by legal presumption.

Secondly, it charges that the Courts below had no right to determine the scope of the submission or the authority of the arbitrator to award damages until after he made such an award. In this case the only real issue before the Court was the question involving the scope of the submission. This was manifest on the face of Petitioner's original complaint to which there was attached and made a part thereof the exhibits so showing. Can it be seriously contended that our already overburdened federal courts cannot pass upon the issues that are actually before them but must confine themselves to superficialities until such time as the parties chooses to discard the *labels* they have themselves applied to the case? If there were any merit to such a contention in the first place, which obviously there is not, Petitioner is indeed in a poor position to advance it in the case at bar, since Petitioner specifically prayed for a declaration of its rights with respect to arbitration of grievances.[46] In short, Petitioner prayed for what it received — a declaratory judgment.[47]

Thirdly, it charges the Court below with having given supersedence to a company policy of "no work-no pay" over federal policy. This charge, of course, is without foundation. The company policy alluded to was given effect only in the sense and to the extent

[46] Tr. p. 4

[47] Pet. App. p. 57

that it was manifested by the absence of any provision in the contract in which it agreed to pay for misassigned work or to submit the matter to arbitration. The Court below accorded it no other significance whatsoever.

Fourthly, Petitioner purports to find express authority in the contract for an arbitrator to make what is termed a remedial award. Reference is made to the use of the word "redress" in the grievance procedure. This Petitioner equates with "remedy." Then, by a process of hyphenation, the grievance procedure becomes the "grievance-arbitration process," as though it were all one and the same thing. This culminates in the conclusion that because all matters to be submitted to arbitration must be processed through the grievance procedure and the grievance procedure contemplates "redress," the arbitration clause must likewise contemplate an award in the form of a "remedy." All of this amounts to another way of saying that, since all arbitrable disputes are grievable, all grievable disputes are arbitrable.

This sylogistic reasoning, of course, conveniently ignores the fact that the grievance procedure and the arbitration procedure are set forth in two entirely separate Sections of the contract. They are not one and the same. Under the grievance procedure any employee may process a grievance about anything at all. There is no restriction whatsoever. On the other hand, the arbitration procedure is strictly limited to "only differences relating to the interpretation or performance of this agreement." All lions are carniverous animals but all carniverous animals are not lions.

Finally, Petitioner raises the rhetorical question of "What is the remedy for subsequent violations of the

same provision of the contract?" This, of course, is with reference to the holding below that the parties had not agreed to submit the question of damages to arbitration. It then proclaims, "There is no deterrent, there is no corrective measure, and merely settlement of the classification does not provide means of redress in the future, for the employee or employees whose rights might thereafter be violated time after time with complete impunity. An arbitration decision which settled only a question of classification would be empty and meaningless." The obvious fallacy of this conclusion is attested to by the fact that there are thousands of cases each day where assignments are made by the respondent in accordance with *settled* classifications leaving no room whatsoever for good faith questioning of the fact that once settled by arbitration future assignments would be made in accordance with the arbitrator's decision. Petitioner's contention also ignores the fact that if this redress is not sufficient it has retained the right to strike for such further concessions as it might demand. And finally, Petitioner has overlooked, or chosen to ignore, the fact that for any actual breach of contract, it has two remedies at law provided it by the Supreme Court of the United States in the *Lincoln Mills* case. It can either sue for and obtain the actual damages sustained, if any, or it can sue for and obtain specific performance of that provision of the contract allegedly breached. Here we might point out that the Respondent is not only bound by good faith to abide by the decision of the arbitrator as to the work that should be assigned to particular classifications in future like cases, but it is also contractually so bound.[18] Hence, even though the lack of job descriptions and

[18] Tr. p. 6 (Section 21-2, Exhibit "A")

classifications might frustrate any claim for damages or for specific performance prior to settlement by arbitration, once the question is settled the company can no longer escape the consequences of a misassignment any more than it can breach with impunity its obligation to pay an agreed-upon wage for the services of its employees.

CONCLUSION

In conclusion, Respondent submits that the mighty storm of righteous indignation with which Petitioner seemingly assails the various district and appellate courts' decisions in its application for writ of certiorari, is upon closer view but a tiny tempest in a tinier teapot. The conflict and confusion, and dire forebodings and the thundering clouds of ominous portent emanate from a frustrated attempt to circumvent collective bargaining by misuse of the Court's power to enforce arbitration agreements where they exist in the field of labor-management relations. There is no conflict, there is no confusion, there has been no eroding of this Court's mandate in *Lincoln Mills*, and this case is without significance beyond the confines of its own peculiar facts and circumstances. Even the

contract from which it originated has long since expired."

Accordingly, certiorari should be denied.

Respectfully submitted,

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"Tr. p. 6 (p. 2, Exhibit "A"); Tr. p. 25 (Exhibit "M")

Certificate of Service

I HEREBY CERTIFY that true and correct copies of the foregoing brief in opposition to Petitioner's Application for Writ of Certiorari have been served on Petitioner, Refinery Employees' Union of the Lake Charles Area, by posting one copy in the United States Mail, air mail postage prepaid, and addressed to Russell T. Tritico, counsel of record for Petitioner, at his offices in the Gulf National Bank Building, Lake Charles, Louisiana; and by posting one copy in the United States Mail, air mail postage prepaid, and addressed to George W. Liskow, also counsel of record for Petitioner, at his offices in the Pioneer Building, Lake Charles, Louisiana, on the 16th day of October, 1959, at 3:00 o'clock, P.M.

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